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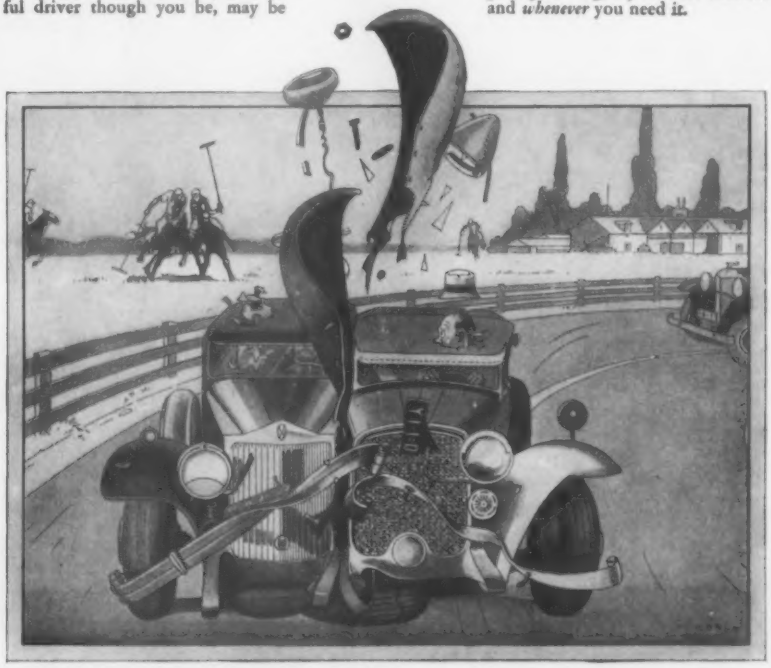

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When at the direction of President Wilson

the Food Administration Grain Corporation was organized to handle the distribution of food during the World War, the eminent counsel chosen to erect the corporate structure picked Delaware for its organization, and The Corporation Trust Company to be its Statutory Representative.

When at the suggestion of President Coolidge

the Flood Credit Corporation was organized to handle the work of the Mississippi flood relief, the eminent counsel chosen to erect the corporate structure picked Delaware for its organization, and The Corporation Trust Company to be its Statutory Representative.

When as part of President Hoover's farm relief

program the Grain Stabilization Corporation was organized, the eminent counsel chosen to erect the corporate structure picked Delaware for its organization, and The Corporation Trust Company to be its Statutory Representative.

When in carrying out President Hoover's suggestion

for restoration of public confidence in the crisis of 1931 The National Credit Corporation was organized, the eminent counsel chosen to erect the corporate structure picked Delaware for its organization and The Corporation Trust Company to be its Statutory Representative.

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Meeting of Committee on Unauthorized Practice of the Law

THE Special Committee of the Association on the Unauthorized Practice of the Law met at the Blackstone Hotel, Chicago, on Monday and Tuesday, November 16th and 17th, 1931. The entire Committee was present, namely, Mr. Charles A. Beardsley, Mr. Stanley B. Houck, Mr. Edward J. McCullen, Mr. John R. Snively, Mr. John G. Jackson, Chairman.

The Committee at this meeting gave particular consideration to the activities of collection agencies, credit associations, accountants, title companies and corporate fiduciaries. It was decided to make a complete review of the statutory and case law relating to practices of collection agencies, in order to determine what activities were lawful and what unauthorized or unlawful. Included in this study is also the relation of attorneys to collection agencies.

The Committee also considered and took under advisement a statement of business principles and practice submitted by one of the larger credit associations as a basis for avoiding unauthorized practice by that association. In this connection the Committee conferred with representatives of the association.

The activities of accountants, particularly in tax matters, and correspondence with accounting societies in this connection, were reviewed by the Committee, and further investigation and conferences with such societies determined upon.

The Committee decided upon a report to Bar associations of the country upon recent satisfactory developments in the relations between the Bar and corporate fiduciaries, and to request local reports on the activities of the fiduciaries.

Arrangements were made for an investigation of complaints received by the Committee of the activities of title companies in certain sections of the country.

Plotting Against Reno

THE Arkansas Supreme Court has upheld the new "Ninety-Day Divorce Law," according to the Hot Springs, Ark. *New Era* of Nov. 24, and quite a tidy lot of business is expected by the lawyers in certain attractive towns of the state in consequence. As the principal resort, now able to offer a combination of recreation, recuperation and quick and painless divorce, Hot Springs naturally stands a good chance to reap a large part of the benefit. The *New Era* gives an account of the "jubilee session" of the Garland County Bar Association, held in the chancery court room, as a result of the decision. Quite appropriately, the question of fees came up and a committee was appointed to consider revision of the scale. The chairman of the meeting urged an upward revision and his views were echoed by a number of those present.

Prospects for demands for legal services appeared extremely encouraging, from statements made by the Prosecuting Attorney, the Mayor, and others. The Prosecuting Attorney said that inquiries were pouring in and that he had at least twenty-five on file. Other lawyers reported numerous inquiries. The Mayor said that he had received two letters recently inquiring about "mail order" divorces. With notable community spirit he urged strict compliance with the law requiring sixty days'

residence before suit may be filed, in order to obtain full benefit of the new law for the entire city. The Chancellor, who was present and before whom the divorce proceedings in Hot Springs will be filed, observed that he had made up his mind that very conclusive evidence would have to be presented on the matter of residence.

Hot Springs admits that even under the new statute Reno has a six weeks advantage in residence requirement, but it will rely, we are told, on the well known thermal waters and its proximity to the large centers of population to offset this advantage. To put it concretely, you can't get rid of anything but money and matrimony at Reno, whereas at Hot Springs you can eliminate malaria at the same time. Of course, from the purely legal standpoint, all other towns and cities in Arkansas are in the same position as Hot Springs, and a nascent rivalry is already reported in Little Rock and certain summer resort places in the Northwest Arkansas Ozarks. But the Bar of the great watering place evidently does not believe the threat is really serious.

Minnesota Bar on the Air

THE radio is being used more and more by the profession as a means of reaching the public with its messages. The Amercian Citizenship Committee has made use of it for several years, and in the last issue the JOURNAL printed a very timely address made over the air by Attorney General Mitchell under the auspices of the Association. Now comes the Minnesota State Bar Association with a weekly series of addresses on legal topics over Station KSTP. Hon. Thomas D. O'Brien, former Justice of the Minnesota Supreme Court, inaugurated the series with an address on "Society and the Criminal." He was introduced by President Morris B. Mitchell of the State Bar Association. Other addresses scheduled for the series were: "Prosecutor and Criminal," by Mr. F. M. Kinkead, County Attorney of Ramsay County; "The Defendant in Criminal Cases," by Mr. Elwood Fitchette, Public Defender of Hennepin County and President of the Hennepin County Bar Association; "The Judge in Criminal Cases" and the "Jury in Criminal Cases," two talks on successive weeks by Hon. Gustavus Loevinger, Judge of the District Court of Ramsay County, and "The Supreme Court in Criminal Cases," by Hon. Samuel B. Wilson, Chief Justice of the Minnesota Supreme Court.

For a Concerted Attack on the Crime Problem

THE time has come for the consideration of the problem of crime in its widest sense by the three legal organizations of national scope: the American Bar Association, the American Law Institute and the Association of American Law Schools, according to the report of the Committee on Survey of Crime, Criminal Law and Criminal Procedure of the last named organization. The report was drawn up for submission at the annual meeting in Chicago on Dec. 28, 29 and 30. The Committee has been cooperating during the past year with similar committees from the American Law Institute and the Section of Criminal Law of the American Bar Association.

The report points out that "substantial and permanent progress toward a better administration of criminal justice requires constructive and coordinate action in (1) research and compilation of such data as may be necessary to form the basis of an intelligent improvement in law and practice; (2) preparing definite restatements, codifications and proposals; (3) advocacy of restatements, codifications and proposals; (4) training of persons for various phases of administration," and adds that it is important to have a clear idea of those portions of the work which each of the organizations can do. Taking up the Law Schools first, the report says they should "undertake the teaching of criminal law and procedure. In view of the unsatisfactory condition of criminal justice in this country and the responsibility of lawyers for improvement we believe it important that the schools inform their students as to the factors which contribute to present conditions as well as the lines along which there may be improvement. How this should be accomplished, as by giving in one course a picture of modern conditions and ideas, or by special instructions along several distinct lines, or in other ways, is of course for the schools to determine. But we here desire to express our belief that law schools should place greater emphasis on the objects and functions of the criminal law; a true conception by the lawyer of his duties to society in the administration of criminal justice; proper standards and methods of criminal practice as contrasted with existing practices calculated to produce miscarriages of justice. A law school which seeks merely to give a knowledge of law as it is fails to perform an important function. In teaching criminal law and procedure the object should be, not only to familiarize the student with the existing law and practice, but also to arouse his interest in remolding the law to meet modern conditions and in improving methods of practice." A list of subjects is suggested for additional advanced instruction by the law school which is adequately staffed. Such an institution, in addition, should undertake research work in social, industrial, political and other conditions which produce crime.

To the American Law Institute the report would assign the task of meeting the well recognized need for clarification and modernization in the substantive criminal law. To this end, it says, the Institute should prepare a Restatement of the Common Law of Crimes and a Code of Criminal Law. As to the first the general method of restatement will naturally be that developed in the restatement of other branches of the law. The drafting of the Code will require additional types of research, such as the collection and comparative study of statutory material; the collection and examination of data pertaining to the administration of the criminal law; the study of social and economic conditions now existing which cause anti-social conduct and which influence the making and enforcement of the criminal law.

The part of the American Bar Association in the program, according to the report, is to participate in the completion of the drafts by means of cooperating committees or other device; to formu-

late practicable plans, through a special committee, for improvement in the personnel by which the criminal law is administrated and to advocate the adoption of those plans. It also urges the American Bar Association to reaffirm its former recommendation that the American Law Institute immediately undertake work on the substantive criminal law.

The report is signed by Albert J. Harno, Edwin R. Keedy, Rollin M. Perkins, James J. Robinson, John B. Waite, John H. Wigmore and Justin Miller, Chairman.

Report of the Judicial Conference

THE Judicial Conference provided for in the Act of Congress of September 14, 1922 (42 Stat. 837, 838; sec. 218, Title 28, U. S. Code) was called and sat for three days, October 1, 2 and 3, 1931. The following judges were present in response to the call of the Chief Justice:

First Circuit, Senior Circuit Judge George H. Bingham.

Second Circuit, Senior Circuit Judge Martin T. Manton.

Third Circuit, Senior Circuit Judge Joseph Buffington.

Fourth Circuit, Senior Circuit Judge John J. Parker.

Fifth Circuit, Senior Circuit Judge Nathan P. Bryan.

Sixth Circuit, Senior Circuit Judge Arthur C. Denison.

Seventh Circuit, Senior Circuit Judge Samuel Alschuler.

Eighth Circuit, Senior Circuit Judge Kimbrough Stone.

Ninth Circuit, Senior Circuit Judge Curtis D. Wilbur.

Tenth Circuit, Senior Circuit Judge Robert E. Lewis.

The Solicitor General and Assistant Attorneys General were present.

Condition of dockets in the Federal Courts.—General Statistics.—On behalf of the Attorney General, the Solicitor General submitted to the Conference a report of the condition of the dockets of the federal courts for the fiscal year ending June 30, 1931, as compared with the fiscal year ending June 30, 1930. Each Circuit Judge also presented to the Conference a detailed report, by districts, of the work of the courts in his circuit for the fiscal year 1931.

From these tabulations it appears that there were pending upon the dockets of the District Courts, at the close of the fiscal year 1931, 152,736 cases as compared with 155,730 cases pending at the close of the previous fiscal year,—a decrease of about 3,000 cases—embracing civil cases, both governmental and private, criminal cases and bankruptcy cases.

The number of pending cases, as thus reported, is as follows:

	1930	1931
U. S. Civil cases	21,320	21,642
Criminal cases	35,849	27,895
Private suits	37,151	36,776
Bankruptcy cases	61,410	66,423
	155,730	152,736

The increase in the number of bankruptcy cases, that is, about 5,000 cases, cannot be regarded (in view of what appears later in this report) as signifying a greatly increased pressure upon the courts. The most significant fact in the above statement is the decrease in criminal cases pending,—a decrease of nearly 8,000 cases. The decrease has occurred in 62 districts; there are 29 districts reporting an increase. There is little variance in the totals for the two years in the other classes of cases. The Attorney General reports that the reduction in the number of pending criminal cases and also, to some extent, in the private suits, indicates that considerable progress has been made in the past year in clearing the dockets and relieving congestion.

The comparison of cases commenced during the fiscal year with those commenced during the previous year is as follows:

	1930	1931
U. S. Civil cases	24,934	25,332
Criminal cases	87,305	83,747
Private suits	23,391	24,000
Bankruptcy cases	62,845	65,335
	198,475	198,414

The comparison in the number of cases terminated shows the following:

	1930	1931
U. S. Civil cases	24,722	25,010
Criminal cases	82,609	91,701
Private suits	23,743	24,375
Bankruptcy cases	60,548	60,322
	191,622	201,408

There was an increase in cases brought under the National Prohibition Act as follows:

	1930	1931
Civil, commenced	11,882	12,374
Criminal, commenced	56,992	57,405

Of cases of this class there were terminated in 1930, 12,938 civil cases and 52,706 criminal cases; and in 1931, 12,103 civil cases and 61,521 criminal cases.

Despite the reduction in the total number of cases pending in the federal courts, congestion continues to be a major problem.

Circuit Courts of Appeals.—It is gratifying to observe that no problem is presented so far as the Circuit Courts of Appeals are concerned. These appellate courts are well up with their work, and such exceptions as temporarily exist are not serious. The Ninth Circuit has sustained sudden and grave losses in the deaths of Judges Gilbert, Dietrich and Rudkin. Judge Gilbert had long been incapacitated, but Judges Dietrich and Rudkin were suddenly stricken in the midst of their most useful activity. A successor to Judge Dietrich has already been appointed, and on the appointment of a successor to Judge Rudkin, and with the legislative amendment recommended by the Conference for the appointment of a successor to Judge Gilbert, the Circuit Court of Appeals of the Ninth Circuit will be provided with adequate judicial service. There is no need of additional Circuit Judges in other Circuits.

District Courts.—Nor is the problem of undue congestion in the Federal District Courts one that is general throughout the country. While the volume of business creates a pressure that is continuous and exacting, it is only in a comparatively few districts that the burden is excessive, or that additional judicial assistance is required. In some Districts there is a serious condition which demands relief. The Conference considers it desirable that each Circuit, so far as possible, should deal with its own needs, and that

by appropriate assignments of District Judges it should be sought to equalize their work and thus promote prompt administration. It is deemed undesirable that, except where absolutely necessary, Judges should be called to service outside their Circuit. This, however, appears to be inevitable, unless the judicial force in certain Districts is increased. After careful consideration of the problem of congestion, and the need of additional Judges, the Conference decided upon the following recommendations:

Removal of restrictions in existing law as to appointment of successors.—The first recommendation relates to the removal of certain restrictions now imposed by statute on the filling of vacancies which now exist or will arise. On this subject the Conference, reaffirming the views expressed at its session last year, adopted the following resolution:

"By the Act of September 14, 1922 (sec. 3, Tit. 28, U. S. Code) Congress created twenty additional district judgeships; but in the belief that the need was temporary and litigations would decrease, it imposed the limitation that vacancies therein should not be filled without a further special act. Experience has shown that the need was permanent, and in every instance (but one,—New Mexico) where a vacancy has occurred there has been no question of the need of continuing the judgeship; but the time involved in getting the necessary special act has caused delay and congestion. There now remain of vacancies that have occurred or will occur in these judgeships so limited the following instances, in which the Conference is of the opinion that provision should be made for the appointment of successors, viz:

2 in the District of Massachusetts:
2 in the Southern District of New York;
1 in the Eastern District of New York;
1 in the Western District of Pennsylvania;
1 in the Eastern District of Michigan;
1 in the Eastern District of Missouri;
1 in the Western District of Missouri;
1 in the District of New Jersey;
1 in the Northern District of Texas;
1 in the Northern District of Ohio;
1 in the Southern District of California;
1 in the District of Arizona.

"In the same general situation, through the existence of a limitation upon filling a vacancy and the demonstrated permanent need that the vacancy, when occurring, or which has occurred, shall be filled, are a circuit judgeship in the Ninth Circuit (Act of March 1, 1929, sec. 213b, Tit. 28, U. S. Code), and a district judgeship in the Southern District of Iowa (Act of January 19, 1928, sec. 4 (i), Tit. 28, U. S. Code)—in both of which vacancies have occurred—and a district judgeship in the District of Minnesota (Act of March 2, 1925, sec. 4, Tit. 28, U. S. Code). The Ninth Circuit Court of Appeals will be left with only three judges, while it has had four for many years and will need four; and the districts of Minnesota and Southern Iowa cannot do without these judgeships.

"Accordingly, in order that from time to time there be no interruption and delay, we request the Attorney General to draft and urge the passage of legislation removing this limitation as to these specified judgeships and making them permanent."

Provision for Additional District Judges.—The Conference was of the opinion, as it was last year, that the removal of these limitations, and the appointment of successors where vacancies now exist or will hereafter occur, as above mentioned, will not give adequate relief. The Conference, after most careful consideration of the need for additional judges, recommends the enactment of legislation making provision for additional district judges as follows:

2 additional district judges for the Southern District of New York;
1 additional district judge for the Eastern District of New York;
1 additional district judge for the Northern District of Georgia;
1 additional district judge for West Virginia;
1 additional district judge for the Southern District of Texas;
2 additional district judges for the Southern District of California;
1 additional district judge for the Western District of Missouri.

With respect to the situation in Missouri, the Conference, upon an examination of conditions there, is satisfied that additional judicial service is needed and that an additional district judge, available for service in both the Eastern and Western Districts, would meet the exigency. The Conference therefore recommends, as above stated, an additional district judge for the Western District of Missouri, with the understanding that he shall be subject to assignment, under provisions of existing law, for such service as may be necessary in the Eastern District of Missouri.

On consideration of the situation in Louisiana, the Conference is satisfied that no additional judgeship is needed in the Western District of Louisiana. The Conference is further of the opinion that judicial service can be adequately maintained in Louisiana by a combination of the Eastern and Western Districts.

The Conference is of the opinion that after providing the additional judgeships above specified no further provision for additional judges should be made in existing districts at this time.

Assignments of District Judges.—The Conference has had brought to its attention instances where the total business in two adjacent districts would not create an undue burden on two judges if it were equally divided, but where the existing unequal division gives the heavy district more than one judge can properly do. In our judgment, this situation does not justify us in recommending an additional judge for the heavy district. The remedy is for the Senior Circuit Judge to determine how much time during the year a judge of the lighter district can reasonably give to the heavy district, and then designate him to duty therein accordingly. Such designation should not be for a few days, now and then, but for substantial, continuous periods, so that calendars may be arranged and disposed of; and should be pursuant to an adopted and announced policy of definitely fixed times and periods. Statutory terms in the lighter district present no necessary obstacle, for they can usually be postponed or rearranged. Such equalization of duty as between judges is clearly contemplated by law, and reasonable cooperation in bringing it about will greatly promote the efficiency and the good repute of the federal judicial system. We approve this policy of designations, and we think its judicious and reasonably insistent application will do much to relieve instances of congestion. The same policy is

applicable, though in less degree, to all districts in the Circuit, though not adjacent.

It was also the sense of the Conference that provision should be made that in case any Senior Circuit Judge is disabled by illness from exercising any power given or duty imposed by the Judicial Code such power or duty shall be exercised by the next Circuit Judge in seniority, and the Conference recommends to the Attorney General the proposal of legislation accordingly.

Questions as to Creation of New Districts and Changes in Existing Districts. Importance of Comprehensive Survey.—The Conference pointed out last year that proposals had been made for the creation, not simply of additional judgeships, but of additional districts, which would involve the provisions of the positions and facilities essential to the equipment of new districts. It seemed to the Conference that the time had come to consider comprehensively the organization of districts and to ascertain the best means of promoting the economical and effective administration of justice in the federal courts, whether by division of districts, consolidation of districts, or creation of new districts. For this purpose a most careful study is needed. Last year the Conference requested the Attorney General to make a survey, as exhaustive as he might find feasible and with estimates of cost and efficiency, in order that the necessary information should be laid before the Conference. The Attorney General has reported that, pursuant to this request, inquiries have been made, and a summary of these inquiries has been submitted to the Conference. It appears that the survey has not yet been completed and estimates relating to comparative costs have not been compiled. The matter is under the careful consideration of the Attorney General who intends at the next Conference to supplement his present progress report.

Judicial Statistics.—The Conference at its last session took under consideration the possibility of improving the compilation of statistics of judicial work in the federal courts. Pursuant to the resolution then adopted by the Conference, proposed forms were submitted for consideration. A further study of the subject has led to the conclusion that, while some improvement in the present forms might be made, it would not go far enough unless there was put into operation, under continuous supervision, a thoroughgoing plan in most, if not all, of the districts. The information now obtainable through statistics is useful to the Senior Circuit Judge in making his report to the Conference, as, with his familiarity with conditions within his circuit, he is able to give the necessary interpretation of the figures presented. The tabulations, standing alone and without such an exposition, are of but slight service for the purpose of forming a judgment of the comparative work of the courts. The need is for such units of specification as will give an adequate view of the work of each court, for uniform methods in the keeping of statistics, so that there may be a basis for comparison, and an expert supervision which will insure the maintenance of records in accordance with the plan adopted.

The National Commission on Law Observance and Enforcement, after considering reports upon the present defects in statistical methods and in the data compiled, has recommended that the compilation and publishing of statistics of the federal administration of justice should be committed to one bureau in the Department of Justice to the end that uniform and adequate methods should be devised and that their prosecution should be competently supervised through the maintenance of a unified system. It is the sense of the Conference that there should be an improved organization of this sort in the Department of Justice in order that the objects sought by the tabulation of court statistics may measurably be attained. Meanwhile the Conference must of necessity rely upon the interpretation by the Senior Circuit Judges of the data in relation to judicial work as set forth in the reports of the respective circuits.

Bankruptcy.—The Attorney General submitted to the Conference a valuable Memorandum relating to the administration of the bankruptcy law. This Memorandum exhibits the results of an exhaustive investigation into the whole question of bankruptcy law and practice, which has been made by the Attorney General at the request of the President. The work has been under the direction of the Solicitor General. As a result, the Attorney General reports:

> "(1) That the Bankruptcy Act has failed to achieve its central purposes.
> "(2) That its administrative machinery is inefficient and subject to exploitation.
> "(3) That without radical revision of the law no substantial improvement can be accomplished."

In support of the statement of the Attorney General as to the failure of the law to achieve its central purposes, his Memorandum shows that the amount realized by general creditors has ranged from 7.7% of the liabilities in 1923 to 7.4% in 1930. It appears from the records "of all the cases closed in the fiscal year ending June 30, 1930—cases which originated for the most part before the beginning of the "depression"—that in 65.44% there were no assets above exemptions; in 82.24% there were assets of less than $500; and in 95.80% the assets were less than $5,000. A further analysis shows that, "in 1930, merchants and manufacturers constituted 21% of the bankrupts," and that, of these, 24.56% had no assets above exemptions; 49.40% had assets less thas $500; and 89.92% had assets less than $5,000. It appears that 43,983 cases, "representing over 79% of the total bankruptcies in 1930," were "nonmercantile bankruptcies," and that, of these, 27,929 were cases of wage earners. From these and other facts, the Attorney General concludes that the bankruptcy courts "have ceased to be important agencies for the realization, liquidation, and distribution of assets and are chiefly engaged in relieving from their debts vast numbers of debtors who obtain their discharges without making any provision for a partial payment of their creditors either out of property or earnings."

The Attorney General has also found that "in practice, discharges are granted virtually for the asking and in most cases quite without regard to the conduct of the debtor or the equities of the case." It appears that during the two and one-half years beginning September 1, 1926 (after the amendments of 1926) and ending March 1, 1929, the clerks' reports show that 85,252 discharges were granted and 776 were denied; and that in the cases closed during the fiscal year ending June 30, 1930, approximately 37,277 noncorporate bankrupts were granted a discharge and in approximately 319 cases of this class discharges were denied. In the case of merchants and manufacturers, it is stated that the percentage of discharges denied was .02% and that in

cases of wage earners the percentage of denials was .004%. The Attorney General reports that in most cases applications for discharge receive no consideration as "no one is under any duty to examine into the bankrupt's conduct and affairs," or "to oppose his discharge, however, fraudulent he may have been." "In the absence of opposition the courts have no power and must grant the discharge outright if no one opposes it;" and "If there is opposition the courts have no discretion in tempering the discharge action to fit the equities of each case."

The Attorney General has also presented his views as to defects in the administrative processes in relation to referees, and the selection, personnel and compensation of trustees in bankruptcy.

The Attorney General has accompanied his Memorandum with suggestions of measures to remedy the defects shown.

The Conference appointed a committee to consider the Memorandum and the proposals submitted by the Attorney General, and the committee made the following report:

"The Committee appointed by the Conference to consider the general supervision of the bankruptcy administration in the district courts reports that it has noted with approval, the request of the President that the Attorney General undertake an exhaustive investigation into the whole question of bankruptcy law and practice, with the purpose of proposing to Congress essential reforms.

"The Attorney General has submitted to the Conference proposed tentative amendments to the bankruptcy act and has, through the Acting Attorney General, Solicitor General Thacher, presented the reasons therefor orally as well as in printed memorandum. We have examined both with a view of being advised wherein the present act, at this time, has failed to achieve the purposes of its enactment in insuring a prompt and efficient realization and proper distribution of the assets of insolvent debtors, as well as granting to honest, but unfortunate, debtors a discharge from their debts in cases where they should be relieved and to deny a discharge where fraud and dishonesty are revealed; also to visit appropriate punishment by imprisonment where the law requires. The able study and diligent research of the administration in the past, under the bankruptcy act, as made by the Attorney General discloses that legislation is required to accomplish a more efficient administration for the benefit of both creditors and the bankrupt.

"We therefore advise the Conference that it recommend to the Congress, through the Attorney General, the advisability of legislation amending the present bankruptcy act as follows:

"(a) By provisions necessary to make the discharge in bankruptcy just and effective; to insure a thorough examination of the bankrupt, with due regard to the public interest involved; and to discourage fraud and waste.

"(b) Measures to encourage prompt steps toward liquidation or settlements by insolvent debtors; in matters of composition; to obtain extensions of time for the bankrupt to pay; relating to assignments for the benefit of creditors; to provide relief of wage earners from garnishments or attachments.

"(c) Measures to promote the appointment of more efficient trustees, with sufficient provision for the voting representation of creditors; a more summary procedure for the administration of the estate of the bankrupt by the trustees, with due regard for simplified and expeditious proceeding in filing schedules; creditors' meetings; sales; and dividends; provisions for agencies to coordinate the bankruptcy administration; and promote uniformity of practice without interference with judicial supervision; to regulate compensation of trustees; and the appointment of referees and consideration of the basis for compensation."

This report of the committee was adopted by the Conference and the recommendations of the Conference are made accordingly.

Probation.—The Conference adopted a resolution that the Senior Circuit Judges be requested to consider the administration of the Probation Law in their respective circuits with a view to its consideration by the next annual Judicial Conference.

Grand Jury Proceedings.—The Conference adopted the following resolution:

"District Judges call to our attention, and we otherwise observe, the delay and expense caused by the necessity of both a preliminary examination and a presentment to the grand jury in cases where the accused intends to plead guilty. We recommend to the Attorney General a study of the matter, and, if thought practicable, that he propose to Congress legislation permitting in such cases a waiver of grand jury proceedings."

Official Stenographers.—It was represented to the Conference that in some districts considerable inconvenience had been caused by the lack of official stenographers. The Conference expressed its views upon this subject as follows:

"Resolved that it is the sense of the Conference that provision should be made for the appointment by the Judge of official stenographers in the District Courts in those districts where such appointment is deemed advisable by the Judge of the District, and that we request the Attorney General to give consideration to the matter with a view of securing the necessary legislative authority for the appointment and compensation of such stenographers."

Amendments to Rules.—The Conference discussed various proposals that had been made for the amendment of the Equity and Admiralty Rules and General Orders in Bankruptcy promulgated by the Supreme Court, and these proposals were submitted for the consideration of that Court.

Circuit Conferences.—At its last session the Conference expressed its opinion that it was feasible under existing laws to hold conferences of the federal judges within each circuit, and its belief that such conferences to deal with local problems of administration would prove to be of no little value. During the past year such conferences have been held in several circuits and have demonstrated their usefulness. It is the sense of the Conference that such conferences should, if possible, be held annually.

Cooperation of Bench and Bar.—In seeking to improve the administration of justice in the federal courts, it is the opinion of the Conference that there should be active cooperation of the Bench and Bar. The Conference has noted with interest the recommendation to this end that has been made by the Committee of the Conference of Bar Association Delegates which was approved by that Conference at its recent meeting.

It is deemed desirable that in each district a committee of representative members of the Bar should be

appointed either by the District Judge or Judges, or by Bar Associations, to confer with the District Judge or Judges. There will thus be afforded an opportunity for judges and lawyers not only to consider together whatever defects in administration may be said to exist within the respective districts, but proposals for remedies may be brought to the test of the most expert judgment. Inconsiderate proposals will thus be promptly discarded and attention centered upon such as may appear to have merit. Inquiries into the administration of justice should be appropriately localized and generalities give place to a definite examination of particular problems. In many instances, it is not unlikely that needed improvements may be obtained by simple arrangements suited to local conditions. Whenever questions arise which relate to the administration of justice in its more general aspects, opportunity may be afforded for bringing such questions, through representatives of these district committees, to the attention of the annual conference of federal judges within the circuit. Again, as a result of such studies in circuit conferences, proposals may be prepared and thoroughly matured for the consideration of the annual Judicial Conference of the Senior Circuit Judges.

The Committee of the Conference of Bar Association Delegates has suggested that a representative member of the local bar committtees could be chosen to represent each circuit at an informal conference to be held at Washington shortly before the regular meeting of this Conference. While the integrity of this Conference, as a Judicial Conference, should be maintained, the Conference would welcome this cooperation of the Bar.

Amendment of the Act Relating to the Judicial Conference.—Last year the Conference considered the appropriate development of its own work. In order to avoid any question as to the scope of the authority which the Congress intended to confer upon the Conference, as such, the Conference thought it advisable that there should be an amendment of the statute which created it (Act of September 14, 1922, 42 Stat. 837, 838; sec. 218, Tit. 28, U. S. Code). The Conference requested the Attorney General to urge such change in the statute as should expressly authorize the Conference to recommend to the Congress, from time to time, such changes in statutory law affecting the jurisdiction, practice, evidence and procedure of and in the different district courts and circuit courts of appeals as may to the Conference seem desirable.

The Conference renews this recommendation.

For the Judicial Conference:

CHARLES E. HUGHES,
Chief Justice.

October 5, 1931.

Rhode Island's New Admission Standards

THE Supreme Court of Rhode Island, on July 10, 1931, adopted rules fixing new standards for admission to the Bar, "thereby placing Rhode Island among the leaders in requiring pre-legal educational qualifications as a pre-requisite to the practice of law," according to an article by Francis I. McCanna in the November issue of the Boston University Law Review. He gives the following details:

"The new rules . . . require every person desiring to be admitted to the bar to have satisfactorily completed two full years' study in some college or university approved by the State Board of Bar Examiners and to have passed the required examination necessary to continue his third collegiate year in such institution; or that he has received an education equivalent to that required for the satisfactory completion of two years of study as a regular student in Brown University. In addition the applicant must further certify that he has been graduated from a law school approved by the Board of Bar Examiners, which school requires attendance upon and successful completion of a course of instruction covering at least three academic years; and that he has studied law six months in the office of an attorney or counselor-at-law engaged in the active general practice of law in this State, which six months may include the vacation period of the law school year, or in addition to the pre-legal education and in lieu of the law school course above referred to, the applicant must show that he has studied law for four years in the office of an attorney and counselor-at-law engaged in active practice in this State or partly in such office and partly at a law school approved by the Board of Bar Examiners.

"Supplementing the Supreme Court rules the Board of Bar Examiners has formulated an elaborate questionnaire in respect to which the attorney in whose office the applicant registers certifies to the character of the applicant and sets forth that he has investigated the applicant's educational qualifications to see that the requirements have been complied with. The attorney also agrees to keep applicant under his constant supervision while a student in his office and especially to inculcate in the mind of the student the high ethical requirements of the legal profession and the absolute necessity of strictly adhering to its high ideals. The practitioner is further charged with the duty of impressing upon the student that law is to be practiced not as a business but as a profession. In inaugurating the new questionnaire system the Board of Bar Examiners kept in mind the desirability of eliminating, so far as possible, candidates whose moral character is not above reproach and recognized that good character is a prime essential to success in the practice of the law."

The Professors and the World Court

MANLEY O. HUDSON, Bemis Professor of International Law, Harvard Law School, has announced, on behalf of the National World Court Committee, the results of a survey among professors in the sixty-seven Law Schools which are members of the Association of American Law Schools, as to their attitude toward American adherence to the World Court. The survey revealed the significant fact that out of the 500 professors who responded, 489 favored adherence by the United States, while only 11 were opposed. Each of the schools was represented by one or more professors who approved the ratification of American membership in the Court upon the terms of the three protocols which have been signed by direction of President Hoover and submitted by him to the Senate.

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THE ETHICS OF ADVOCACY

Peculiar Elevation of the Code of Ethics Comes from the Fact that the Attorney Holds a Public Office and Therefore a Public Trust—Ideals and Aims Set Forth by Mr. Justice Harlan—Radical Differences Between English and American View of Obligation to Accept Retainers—Problems of Prosecution and Defense, Etc.*

By Charles H. Tuttle
Member of the New York Bar

THE ethics of a profession are its rules of conduct. But to the legal profession its canon of ethics implies something more. There is a close relation between morals and the law, between righteousness and justice. Blackstone defined the common law as "a rule of conduct commanding what is right, and prohibiting what is wrong." The ethics of the legal profession, therefore, are not merely guides to its conduct, but the expression of its sense of consecration as part of the ministry of justice—its appreciation that a share in the administration of justice between man and man is the highest prerogative which can come to anyone, and constitutes a dedication to the service of the moral order. Judge Sharswood, in his book on Legal Ethics written in the last century, recognized this spiritual relationship, when he admonished the Bar:

"Let it be remembered and treasured in the heart of every student, that no man can ever be a truly great lawyer, who is not in every sense of the word, a good man."

Much has been written and said to the effect that the occupation of the lawyer is not a business but a profession. But this truth does not in itself explain the peculiar elevation of the code of ethics which has sprung out of the conscience of the American Bar. The inspiration rather has come from the greater fact that the attorney holds a public office and therefore a public trust, and that the chief function of that office is to vindicate the truth that the true administration of justice is the cornerstone of civilization and the essential assurance of the happiness of mankind. As said by Lord Holt:

"The office of an attorney concerns the public, for it is for the administration of justice."

Perhaps the profession's sense of a high calling and of the ideal of service by which it is increasingly seeking to regulate the conduct of its members has never been better put than by Mr. Justice Harlan when on the occasion of the retirement of Mr. Justice Brown from the Supreme Court of the United States, he said:

"Your profession, Gentlemen of the Bar, is a most noble one. None is more so, unless we except that of the Ministry of the Gospel. But the opportunities which even that exalted profession has for good in its wide sphere of action are no greater than those which the Bar enjoys in its particular sphere of action. Gladstone said that the members of the English Bar were inseparable from English national life and from the security of English institutions. We may, with absolute truth, say the same thing in respect of the relations that American lawyers hold to our national life and institutions. . . . Whether the gloomy forebodings of the pessimist will soon be verified, whether lawlessness and a failure to enforce the law is long to continue in our own country; whether public and business life is to become for many years affected by corruption, will depend, Gentlemen of the Bar, very largely upon the members of your profession. If the lawyers stand, as one man, firmly and courageously for law and order, for equal and exact justice, for the rights of all as established by law, and for cleanliness in public and business life, the people will heed their counsel, and follow the ways of right and truth and justice worked out by them."

The ideals and aims set forth by Mr. Justice Harlan cannot be pursued unless the Bar preserves independence and courage. This is by no means an easy task.

A trial lawyer is at times, when offered a retainer, confronted by the unpopularity of the cause. Frequently the public deeply desire that a certain litigant shall lose or a certain accused shall be convicted. Many laymen, ignorant of the true relation of the bar to the administration of justice, censure able counsed for undertaking to represent such a person in court. There seems almost to be a popular desire that the person involved shall be without benefit of counsel. This spirit is a mild manifestation of the impulse to lynch. The popular prejudice against the individual or the cause extends itself against the advocate; and, when a lawyer is a candidate for public office, the opposition usually plays upon this prejudice, by listing his unpopular clients or causes.

This well known social reaction raises the question whether the ethics of advocacy require the lawyer to resist it or permit him to be swayed by it. The issue is an important one, for not infrequently fundamental principles of liberty underlie an unpopular cause. Bad law and unsound public policy are always likely to be the fruitage of public prejudice.

The English and the American views as to the obligations to accept retainers differ radically. In England, according to the authoritative statement of the General Council of the Bar, a barrister is always bound, except under very special circumstances, to accept, upon tender of a proper fee, a retainer in a case which merits the judgment of the court. This traditional practice of the English Bar was forcibly expressed as follows by Lord Eldon in *Ex parte Lloyd,* Montague, pp. 70n, 71n:

"A barrister ought not to exercise any discretion as to the suitor for whom he pleads in the court in which he practices. If a barrister was permitted to exercise any discretion as to the client for whom he will plead, the course of justice would be interrupted by prejudice to the suitor and the exclusion of integrity from the profession."

The reasons for this view were marshalled by Erskine in defense of his acting as trial counsel for Thomas Paine, against whom as an infidel and a revolutionary popular hatred was intense. Erskine said (*Speeches of Lord Erskine,* edited by James L. High, 1876, pp. 473-5):

"In every place where business or pleasure collects the public together, day after day, my name and character have

*Address delivered before the Conference of Bar Association Delegates at Atlantic City, 1931.

been the topics of injurious reflection. And for what? Only for not having shrunk from the discharge of a duty which no personal advantage recommended, but which a thousand difficulties repelled. . . . Little indeed did they know me, who thought that such calumnies would influence my conduct. I will forever, at all hazards, assert the dignity, independence and integrity of the English Bar, without which impartial justice, the most valuable part of the English constitution, can have no existence. From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned in the court where he daily sits to practice, from that moment the liberties of England are at an end. If the advocate refuses to defend, from what he may think of the charge or of the defense, he assumes the character of the judge; nay, he assumes it before the hour of judgment; and in proportion to his rank and reputation puts the heavy influence of perhaps a mistaken opinion into the scale against the accused in whose favor the benevolent principle of English law makes all presumptions, and which commands the very judge to be his counsel."

On the other hand, the view of the American Bar is that no lawyer is obliged to accept a retainer, even though the cause is one which clearly merits the judgment of the court. Canon 31 of the American Bar Association declares:

"No lawyer is obliged to act either as adviser or advocate for every person who may wish to become his client. He has the right to decline employment. Every lawyer upon his own responsibility must decide what business he will accept as counsel, what causes he will bring into court for plaintiffs, what cases he will contest in court for defendants."

The English rule is so thoroughly understood that it protects English lawyers from much of the lay criticisms and penalties which too often befall an American lawyer appearing in an unpopular case; and it applies out of the courtroom the principle supposed to obtain in the courtroom that the law is no respecter of persons. The extent, however, to which the English rule is carried is illustrated by the fierce controversy in and out of Parliament over the act of Sir Edward Carson and Mr. F. E. Smith in appearing as barristers for one of the principals in the famous Marconi case when some of the issues were likely to be considered in Parliament, of which they were members. In defending not merely their right but their duty to accept the tendered retainers, Sir Ralph Neville, one of the Justices of the Chancery Division, wrote (London Times, June 16, 1913):

"As it was once put to me, always remember that you are in the position of a cabman on the Rank bound to answer the first hail."

The fallacy, not so much of the principle, as of this attempted justification of its application, was speedily revealed when Messrs. Carson and Smith subsequently felt constrained to refrain from voting in Parliament on these very matters. As said by a writer in the London Times (June 21, 1913):

"Every one must agree that they rightly abstained. . . . But does not the very sense of the necessity for their present inaction supply the verdict on their previous action? Unless—which is inconceivable—they put their position as members of the Bar before their duty to their country as members of Parliament."

In other words, the English rule could not be so strictly applied as to justify a breach of the universal rule that a man cannot serve two masters. The privileges and immunities of an attorney do not override the other obligations of life, whether in or out of court; and, except upon consent of all concerned, given after full disclosure, no lawyer can properly undertake to represent conflicting interests.

In passing, it may be observed that the Bar of Ancient Rome, like the American Bar, did not agree with Lord Erskine's rule. Quintillian, in expressing his view of the ethics of advocacy, said:

"The advocate will not undertake the defense of every one; nor will he throw open the harbor of his eloquence as a port of refuge to pirates."

The American Bar has, however, adopted so much of the views expressed by Lord Erskine as declares that it is the right of a lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the accused's guilt. Indeed, it is held to be his further right—in fact, his duty—after having undertaken such defense, to present on behalf of the accused every defense that the law of the land permits. The Canons of Ethics expressly so declare; and, in so declaring, they utter their only principle which encounters much lay dissent. Many laymen have expressed the thought that this principle has latent in it the seeds of hypocrisy, promotes sophistry in court, and countenances a strain of venality. The lawyer answers, in the words of Erskine, that in our system of justice the accused is enitled to have said for him the best which can properly be said; that the law contemplates, and if necessary will provide, an advocate for every accused; and that the role of counsel is distinct from that of the judge. Indeed, the right to the assistance of counsel is one of the rights expressly guaranteed in the United States Constitution.

But the principle that a lawyer may ethically represent a client, regardless of his personal opinion as to his guilt or past behavior, must be taken with certain qualifications. It has undergone an upward evolution in the ethics of the Bar, which may be neatly illustrated by taking as the starting point Dr. Johnson's statement (29 Canadian Law Times, p. 1021):

"A lawyer has no business with the justice or injustice of the cause which he undertakes unless his client asks his opinion, and then he is bound to give it honestly. The justice or injustice of the cause is to be decided by the judge."

Compare that primitive formulation with the affirmation now part of the oath of an attorney as recommended by our American Bar Association:

"I will not counsel or maintain any suit or proceeding which shall appear to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land."

Always must it be remembered that most controversies have two sides. Justice is not a mere categorical affirmation. It is an observation of the balance arrived at after placing in the scales all that can sincerely be said from either side. To supply this material and to see that it is justly weighed, is the real and the necessary function of the true advocate. Lord Eldon is reported to have said that laymen usually believe that all lawsuits are either black or white, whereas in truth the greater majority are neither but rather are gray. George Eliot said, in her novel Romola, "Who can put his finger on an act and say, 'This is justice'? Justice is like the Kingdom of God; it is not without us as a fact, but within us as a great yearning."

If one desires a figure of speech with which to picture the present-day view of the ethics of advocacy in this respect, one finds it in the declaration of Sir Alexander Cockburn at a banquet in Middle Temple Hall (J. W. Hiner, 49 National Corporation Reporter, 171), that:

"The arms which the advocate wields are to be the arms of the warrior and not of the assassin."

Ethically, the general principle which permits a lawyer to represent a client without regard to personal

opinion as to his guilt or past conduct, can be defended at all only by emphasizing its corollaries as declared in the Canons of Ethics.

The first corollary is that, inasmuch as the personal opinion of the advocate as to his client's guilt or innocence is irrelevant, it is improper for him to assert in argument his own belief in his client's guiltlessness or in the justice of his cause.

A second corollary is that the methods of defense must be within and not without the truth and the law. As said in the Canons, the lawyer owes entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights, and his utmost learning and ability, to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may rightly expect his lawyer to assert every such remedy or defense. But it is steadfastly to be borne in mind, declare the Canons, that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client.

A third corollary is that, although a lawyer may properly represent an accused whom he believes guilty, he may not use any guilty means of shielding him, and must terminate the relationship if his client or others persist in so doing.

This ethical requirement was neatly illustrated in Question 146 propounded to the Committee on Professional Ethics of the New York County Lawyers Association. The question postulated a trial where the issue was the genuineness of a certain document. A handwriting expert of repute, called by the defense, certified that the paper was forged. The next morning, plaintiff's counsel, without cross-examining the expert, said publicly to the court that until the expert's testimony he had believed in the genuineness of the document and the justice of the plaintiff's cause, but that now he felt that an imposition had probably been practiced upon him; that he did not propose to practice an imposition upon the court or any other person; and that therefore he asked for a dismissal of the case. Subsequently, the plaintiff was tried for the alleged forgery and acquitted, but the court on the civil side refused to reopen the case. The Committee was asked to say whether in its opinion the duty of the plaintiff's counsel was limited to a withdrawal from the case; and whether it was his duty in any event to cross-examine the expert before asking a judgment against his client.

The answer of the Committee was as follows:

> "*Answer:* A lawyer should not seek to secure for his client relief predicated upon testimony known to him to be false. The question, however, does not suggest such *knowledge*, but merely the attorney's individual conclusion. While the question implies that this conclusion was reached upon insufficient investigation, and that he acted imprudently, nevertheless if he reached the conscientious conclusion that further prosecution of the action would be an imposition upon the Court, the impropriety of his continuance in the cause is apparent. In the opinion of the Committee, unless the client consented to the retirement of the attorney, or to the dismissal or discontinuance of the cause, he should privately have stated to the Court his application for leave to withdraw, and the reasons therefor, and should have asked that the cause be continued to enable the client to procure other counsel.
>
> "In the opinion of the Committee, no general rule can be laid down respecting the duty of cross-examination."

This answer contains many interesting and instructive features. Thus, it carries forward the canonical principle already discussed that the lawyer is not compelled to act as the judge; that for him there is in ethics a difference between knowledge and mere personal opinion; that nevertheless he is not thereby released from obeying the dictates of his conscience; and that where he conscientiously feels that he cannot proceed further with the cause, his duty is to withdraw rather than to confess judgment adverse to his client.

But suppose the obstacle is not unwillingness in a criminal case, where liberty is at stake, to further a possible imposition upon the court, but rather in a civil case loss of confidence in the merit of the client's cause in point of law. Should the lawyer confess judgment, or should he merely withdraw?

This question was answered differently by the several judges of the English Court of Common Pleas in *Earl of Beauchamp vs. Overseers of Madresfield,* L. R. 8 C. P. 245. There an appeal was taken to that Court by the Earl of Beauchamp and by Lord Saulsbury on the ground of ineligibility because they were peers of Parliament. On the argument counsel for both appellants stated that it was vain to argue that a peer had a right to vote in the election of a member of the House of Commons. Of the four judges of the Court, two commended and two condemned this candor, which necessarily led to a judgment on appeal adverse to the clients. Judge Keating in commenting said:

> "I would merely desire to add an expression of my entire approval of the course pursued by the learned counsel for the appellants; and to say that I have yet to learn that it is otherwise than the duty of counsel to say so when he finds a point not to be arguable. I have always understood it to be the chief function of the Bar to assist the court in coming to a just conclusion."

On the other hand, Judge Brett, who spoke in condemnation of Counsel's course, said:

> "I feel extremely reluctant to give any judgment in this case. The course which has been pursued by the counsel for the appellants has placed the Court in great difficulty. I must confess I entertained considerable doubt whether the claim set up could be supported; but I thought it right to make some suggestions for the purpose of ventilating the propositions stated by the learned counsel in admitting that they had no case. I quite agree that it is the duty of counsel to assist the Court by referring to authorities which he knows to be against him. But I cannot help thinking that, when the counsel has satisfied himself that he has no argument to offer in support of this case, it is his duty at once to say so, and to withdraw altogether. The counsel is master of the argument and of the case in court, and should at once retire if he finds it wholly unsustainable, unless indeed he has express instructions to the contrary. With the greatest respect for the two learned counsel who have appeared for the appellants in these cases, I must confess I do not quite approve of the course which they have taken."

It is difficult to escape from the justice and ethics of this latter view. While every lawyer has the high duty of assisting the court in coming to a just conclusion, he is not authorized to cast his client in judgment without his consent and without an opportunity to be heard through other counsel who may hold a different opinion of the law.

A kindred question is whether counsel are under a duty to call the court's attention to judicial precedents or legal principles which make against his client's case and which have been overlooked by opposing coun-

sel. Such a duty exists, if the lawyer's chief obligation is to assist the course to a just conclusion; it is non-existent if his chief duty is to see that his client wins.

The Canons of Ethics of the American Bar Association contain no express ruling upon this point. They declare that it is not candid or fair for a lawyer knowingly to misquote the law or a writing or to cite as an authority a decision that has been reversed or a statute that has been repealed; but they are silent as to whether on a disputed point of law, counsel should call attention to adverse precedents or statutes not otherwise mentioned.

I think that it is a common practice to regard the duty of assembling adverse material as resting exclusively upon adverse counsel. This view is not without judicial support. In *Moody vs. Davis,* 10 Ga. 403, 410, Judge Nisbet said:

> "It is not the duty of counsel to suggest points of law which are against his client; but it is his duty to insist upon no point which he knows to be contrary to the law."

"On the other hand, profiting by silence is difficult to distinguish from profiting by concealment, where the issue is one of justice and the conduct is that of a minister of justice. Ida M. Tarbell, in her Life of Abraham Lincoln (1909), Vol. 1, pp. 255, 256, amusingly illustrates the higher ideal by relating an instance where, before the Supreme Court of Illinois, Mr. Lincoln in reading from a reported case some strong language in favor of his contention, read a little too far, and soon became conscious that he had plunged into an authority against himself. Pausing a moment, he drew up his shoulders in a comical way, and, half laughing, went on: "There, there, may it please the court, I reckon I've scratched up a snake. But, as I'm in for it, I guess I'll read it through." Then, in his most ingenious and matchless manner, he went on with his argument, and won his case, convincing the court that it was not much of a snake after all.

At times, the attorney's client is the government. Is the duty of such an attorney as to the matters which we have been discussing, any different from that of an attorney representing a private client?

The fifth of the Canons of Ethics declares:

> "The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible."

But the suppression of facts or the secreting of witnesses is reprehensible on the part of any attorney, whether representing a public or a private client. The real issue is not as to the negative duty not to suppress, but as to the affirmative duty to disclose.

In reviewing the judgment of conviction in the *Sacco-Vanzetti case,* the Supreme Court of Massachusetts said:

> "A prosecutor is violating no canon of legal ethics in presenting evidence which tends to show guilt while failing to call witnesses in whom he has no confidence, *or whose testimony contradicts what he is trying to prove.*"

The difference in text and implication between this dictum and the fifth of the Canons of Ethics is striking. No attorney in any case is obliged to call a witness in whose veracity he has no confidence, for the law holds that the side calling a witness vouches for his credibility; but that is altogether a different thing from not calling or disclosing a witness whose testimony is not known to the other side, merely because the witness's testimony will contradict what the attorney is trying to prove.

May a public prosecutor ethically follow this dictum of the Supreme Court of Massachusetts; or if he may not, why is there no corresponding duty upon the part of the attorney for the defendant or private client?

If the answer be that such a standard is too ideal for a practical administration of the law (human nature being what it is), the retort may well be that then our administration of justice is still carrying within itself some of the vestiges of the old trial by battle, where the issue was decided by skill in swordsmanship and the judge was merely a referee.

As has well been said, we have not as yet altogether emerged from the *caveat emptor* stage of justice. Our legal ethics are evolving through much the same stages as our commercial ethics. Some centuries ago it was for the buyer to determine at his peril whether the ring which he purchased was gold or brass. Then gradually arose, both in commerce and in law, the doctrine of the implied warranty. If the seller knew that the buyer was buying the ring as a gold ring, the seller impliedly warranted it to be such. But the custom and the law of commerce are gradually evolving into still a third stage. The seller must now, at least as to certain merchandise, do more than refrain from falsehood. He must tell the whole truth. He must declare the number of karats of gold in the ring, and the proportion of the gold to the other substances.

In the administration of justice, we are still to a certain degree in the second stage of this evolution. Certain of the acknowledged privileges of a duel or a game are still present and recognized to the point of toleration. There are those who claim that the higher ideals of an evolution to the third stage are already obligatory, as part of the ethics of advocacy, upon an attorney representing a prosecuting government. They overlook that their own arguments logically place the same obligation upon an attorney representing the accused or a private litigant. Are they not both ministers of justice? Are they not both under a duty to aid the court in reaching a just conclusion?

This common notion that in a criminal case the prosecutor is bound to a high degree by the ethics of advocacy, whereas the defense is bound by little or none, is being subjected to much reconsideration at the present time. The growth and multiplicity of crime, the rise of gang power, the frequent ineffectiveness of prosecution, have raised an increasing protest against that philosophy of advocacy which allows the defense to treat the law as a mere game, while holding the prosecutor to the highest standards of fair play and candor. Thus, the Attorney-General of the State of New York, moved by the disastrous result of a recent trial of a notorious gangster, has asked the legislature for a law against surprising the prosecution with an alleged alibi asserted too late for effective investigation. An increasing number of statutes required a defense of insanity to be affirmatively pleaded if it is to be considered. An increasing number of other statutes place upon the defense the burden of explanation even in a criminal case. Only this year, the Legislature of New York made it possible in a criminal trial for passing a worthless check to make a prima facie case merely by showing that payment had been refused for lack of funds or credit.

These instances manifest a growing tendency to equalize as between the prosecution and the defense

the ethical obligation of candor and disclosure. They tend to render a trial less a game and more an exposure of the truth in its entirety. This tendency will, I believe, continue until for both sides and in all cases the principle of candor and disclosure shall have wholly replaced that of concealment and strategic surprise, and until the last vestiges of trial by battle shall have disappeared. Certainly, it cannot be long before, at least in centres where judicial business is congested, the American law adopts the English plan whereby matters of detail and the exchange of information necessary to a fair and honest trial, are fully thrashed out in advance before competent representatives of the court. Certainly it cannot be long before we so unshackle our judges that they, like the English judges, may even in jury cases become participants in, rather than mere umpires of, the exposition of the truth.

Our English brethren have been before us in the development of these ethics of advocacy. An article on the "Hundred Years" War for Legal Reform in England, published in The Consensus for March, 1931 (the official organ of the National Economic League) thus summarizes the English practice as to the ethical principle of full disclosure by both sides:

> "Having eliminated from the trial docket the cases calling for summary and declaratory judgments, the next problem is to provide the parties to the cases which must be regularly tried with all the information which is necessary to enable them to prepare for trial. Instead of conniving at the instinctive desire of counsel to keep his adversary as far as possible in the dark, lest by obtaining information he should become more formidable, the English rules provide for the most thorough disclosure and discovery.
>
> "Discovery is one of the primary titles in the books on English procedure. From the minor doctrine in the chancery practice it has grown into a controlling principle embracing all litigation in the high court. Practically every case, commenced in the ordinary way, is sent at once to a master on a summons for directions, who makes an order mapping out the course which it is to follow."

Such language and practice will sound as strange, if not heretical, doctrine in the ears of many of our American trial lawyers who have grown up in the tradition of playing the game with the cards close to one's vest, to say nothing of a few up one's sleeve. As pointed out in the publication just mentioned, our American Bar has always been inclined to fear and distrust disclosure before trial. It has been thought to tend to produce framed-up cases and perjured testimony. But it must not be forgotten that want of disclosure permits much perjury to be clothed by surprise with immunity; and, in addition, causes great delay, multiplies expense, hampers an adequate presentation of the real merits and diminishes public confidence in the ability of the courts to find the truth. The spirit of the times calls for disclosure, not concealment, in every field—in business dealings, in governmental activities, and in international relations. "The experience of England makes it clear that the courts need no longer permit litigating parties to raid one another from ambush." Disclosure, not concealment, is good morals and good ethics; and neither good morals nor good ethics can fail to aid the cause of justice.

In keeping the Temple of Justice pure of the money-changers, the Bar has constantly to contend with those who foster litigation for its gains or who by advertising seek employment for their powers of advocacy. The true function of an attorney is to discourage litigation. Thereby he usually serves his client best, and invariably serves the community and the cause of justice well. As Lincoln said in an address to young lawyers:

> "Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser—in fees, expense and waste of time. There will always be enough business. Never stir up litigation. A worse man can scarcely be found than one who does."

No discussion of the ethics of advocacy can approach adequacy, without referring to the lawyer as a gentleman. Courtesy and good breeding are the sweet savor in practice before the court. The Bar has had occasion to teach manners to certain members of the Bench. The appearance of doing justice is an essential part of the actual doing of it. The Bar needs to teach this lesson also to its own members. Too often the desire of a client to "treat 'em rough" colors to the detriment of justice and the dignity of the profession the relation between the opposing counsel. Too often are personalities between counsel mistaken for zealous advocacy. Perhaps few causes are more potent in impressing upon the public an unfavorable impression of our administration of justice and of the standards of our profession than the failure of lawyers to remember that not they, but the clients, are the litigants. Certainly in no other profession is reputation so speedily measured on the part of associates in accordance with the standards of the code of honor among gentlemen. The lawyer who does not regard his word as good as his bond speedily becomes a marked man at the Bar.

The same principle of courtesy limits counsel in the use of the privilege of defamation in the course of a trial. As set forth in the canon, a lawyer should always treat adverse witnesses and suitors with fairness and due consideration, and he should never minister to the malevolence or prejudices of a client in the trial or conduct of a cause.

The usual causes of any wide-spread breaches of the ethics of advocacy are ignorance, defective education, overcompetition and pernicious practices too long tolerated.

The abuses in bankruptcy in the Southern District of New York, which came under investigation while I was the United States Attorney, are an illustration. As set forth in the report of counsel to the Bar Association, the bulk of the bankruptcy practice in New York City was concentrated in the hands of approximately twenty-one law firms. Competition for business was savage. The practice of allowing the attorney for the petitioning creditors to become attorney for the receiver and trustee had been not only tolerated but recognized by the courts. The Bar had long allowed to go unrebuked the wellknown consequence that the position of attorney for petitioning creditors was purchased or usurped by bribery, perjury, or the splitting of fees with the attorney for the bankrupt or with the collection agency that had been instrumental in procuring the case for him. By long custom, the bankruptcy business came to be regarded by many who conducted it as an exception to the usual ethics of advocacy.

The judges of the Southern District, in reporting to the Supreme Court upon the results of the investigation, listed among the fundamental causes of those abuses this practice which invited collusion, and also "the general ignorance of all standards of professional

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JAMES MADISON

He Stands Out as Conspicuously Exhibiting a Blend of Ideals and Purposes, Fitting Him to Receive the Confidence of Washington and the Intimate Friendship of Jefferson, With a Constructive Ability and Aptitude for Conciliation Which in the Supreme Test Won for Him the Deserved and Distinctive Title of the Father of the Constitution.*

By Hon. Charles Evans Hughes
Chief Justice of the Supreme Court of the United States

As we approach the two hundredth anniversary of the birth of Washington, our thought is directed, not simply to his own incomparable career, but also to the essential collaboration in statecraft which crowned the success of Revolution. We owe our institutions to the operation of two forces,—the pressure for unity and national power which made possible a strong Republic, and a passion for individual liberty, which was jealous of strength and insistent upon the protection of what were regarded as fundamental rights. Two types of leadership appear reflecting the devotion of rare political genius to the one or the other of these aims. It is the unsurpassed distinction of Virginia, not only that from her soil sprang so many eminent statesmen of the formative period, but that she brought each of these types to the highest point of development, finding their historic illustration in George Washington and John Marshall, in Patrick Henry and Thomas Jefferson. Another personality, in whose honor we are met today, stands out as conspicuously exhibiting a blend of ideals and purposes, fitting him to receive the confidence of Washington and the intimate friendship of Jefferson, with a constructive ability and aptitude for conciliation which in the supreme test won for him the deserved and distinctive title of the Father of the Constitution.

James Madison began his public life in the Virginia Convention of 1776, at the age of twenty-five, and continued it with but slight interruption until he left the Presidency, forty-one years later, to enjoy the retirement of an experienced political philosopher. In the picture of that long public career, there are lights and shades. In the effort to arrest attention by novel and sensational emphasis, there is often observed a tendency to resort to biographical distortion by making a parade of mistakes and frailties. While historic accuracy is always desirable, a sense of proportion is quite as essential to a veracious narrative as familiarity with details. Much of the work of men in public life is inevitably concerned with issues and conflicts, which, although they seem to be of transcendent importance at the time, rapidly give place to other controversies and have but little permanent influence. Other labors are of a monumental character, revealing the genius of leadership and conferring lasting benefits. We are thinking today of such achievements.

I shall not abuse the privileges of this occasion by an attempt—futile, indeed, it would be—to make a comprehensive review of Madison's career, embracing his activities in the new Government, as party leader in the Congress, as Secretary of State, and as President, and involving an examination of the strife of parties, the diplomatic difficulties culminating in war, the humiliations and victories of that war, and the circumstances of the ensuing peace. Important as are these events in the history of the period, their consideration should not be permitted to detract from our paramount interest in the outstanding work of Madison in laying the foundations of the Republic. In this brief tribute, I present to you Madison in the distinction of his greatest service, as an architect of institutions and a defender of liberty.

Of the illustrious Virginians to whose public service the Nation is indebted, three were preeminent in establishing our Federal Constitution, Washington, Madison and Marshall. Washington not only won opportunity by his military success, but made the Constitution possible by presiding at the Philadelphia Convention and giving to the issue of its labors the essential support of his great influence. "A Confederation," John Quincy Adams said, "is not a country." And in the truest sense Washington became the Father of his Country as a Nation equipped with the requisite authority of national government. At a later day, Marshall made this authority secure by his judicial exposition of cardinal constitutional principles. But both the inspiring leadership of Washington and the juristic skill of Marshall depended on the development and formulation of the constitutional scheme. In that supremely important enterprise, Madison had the leading part.

He was well equipped for the task by temperament, studies and political experience. Cool, cautious, deliberative, he was capable of prolonged concentration in intellectual work, which resulted in convictions securely based in profound study and adequate reflection. His mental equilibrium was not upset by gusts of passion and he had no aptitude for attempts to sway others by tempestuous eloquence. He sought to convince, and he became formidable in debate because he was thorough in preparation and precise in statement. With his regard for the processes of reason, there was no acerbity in his disposition, and there was a notable absence of any assumption of superiority. Exceptionally modest, he was tolerant in spirit, temperate in speech and conciliatory in action.

In his studies he was his own best preceptor, and he was driven by an insatiable desire for knowledge. When we reflect upon the slender scholastic opportunities of his day, we must not overlook the advantage of a student life unencumbered by a bewildering multiplicity of activities which absorb the energies of youth, too frequently at the expense of intellectual interests. Nor was the ambitious student embarrassed by a host

*Address delivered at the unveiling of the bust of James Madison in the State Capitol at Richmond on Tuesday, Sept. 29.

of attractive courses and a superabundance of material leading to a dissipation of effort. We are told that Madison's favorite studies at Princeton were the history of the free states of antiquity and all subjects relating to government, and, despite the handicap of delicate health, his unremitting industry won for him the reputation of being the "deepest student" in college. Perhaps it was in the informal association of undergraduates in the American Whig Society, which he organized, that he found the most helpful discipline in the preparation of papers and in earnest debates upon government. After leaving college he continued his intellectual pursuits at home, and he brought to his public career a comprehensive knowledge of ancient and modern history which has been described as "quite unequalled among the Americans of the Revolutionary period."

With all his calmness and studiousness, he was not destitute of zeal. He had the zeal of a liberal mind. This became apparent at the very outset when, as a delegate to the State Convention which framed the constitution of Virginia, he became the champion of religious liberty, a cause to which he was devoted throughout his life. A deeply religious man, he wished religion to flourish in a free atmosphere, without leaning upon the support of government with the consequent dangers of governmental interference. Freedom of conscience in his view was a fundamental right, and it was his Amendment which led to the substitution for the words "fullest toleration," the provision that "All men are equally entitled to the free exercise of religion according to the dictates of conscience." He would have gone even further than the Convention by prohibiting emoluments and privileges on account of religion. Eight years later in the Virginia Legislature he determinedly opposed the assessment bill for the support of churches, and as the result of the response to his "Remonstrance" sent broadcast through the State, the proposed resolution was defeated, Jefferson's bill of 1779 was revived and passed, and the cause of religious liberty in Virginia had a lasting triumph. Her example was influential in other States, and Madison takes his place with Roger Williams and Thomas Jefferson in the front rank of those to whom we are indebted for the American conception of the essential freedom of the spirit from governmental license or restraint.

After his first brief term in the State legislature, Madison was sent in 1780 as a representative of Virginia to the Continental Congress, and his experience there gave him an intimate knowledge of the perils of Independence in the absence of Union. He put the case pithily in these words: "The close of the war brought no cure for the public embarrassments. The States relieved from the pressure of foreign danger and flushed with the enjoyment of independent and sovereign power; (instead of a diminished disposition to part with it), persevered in omissions and in measures incompatible with their relations to the Federal Government and with those among themselves." With his keen realization of pressing need, it was natural that Madison should have joined earnestly in the effort to "form a more perfect Union." In describing the genesis of the Federal Convention, Madison tells us of his own important part while not withholding the credit due to others who were seeking the same end. "The change in our government," he said,[1] "like most other important improvements ought to be ascribed rather to a series of causes than to any particular and sudden one, and to the participation of many, rather than to the efforts of a single agent. It is certain that the general idea of revising and enlarging the scope of the federal authority, so as to answer the necessary purposes of the Union, grew up in many minds, and by natural degrees, during the experienced inefficacy of the old confederation. The discernment of General Hamilton must have rendered him an early patron of the idea. . . In common with others, I derived from my service in the old Congress during the later stages of the Revolutionary War, a deep impression of the necessity of invigorating the federal authority. I carried this impression with me into the legislature of Virginia." The fact of greatest importance is that out of Madison's efforts in that legislature grew the resolution in 1785 for the appointment of commissioners to meet at Annapolis "in order to form some plan for investing Congress with the regulation and taxation of commerce." Madison adds that "Although the step taken by Virginia was followed by the greater number of the States, the attendance at Annapolis was so tardy and so deficient, that nothing was done on the subject immediately committed to the meeting. The consultations took another turn." These resulted in the recommendation for the meeting in Philadelphia. As to this recommendation, Madison says: "The manner in which this idea rose into effect, makes it impossible to say with whom it more particularly originated. I do not even recollect the member who first proposed it to the body. I have an indistinct impression that it received its first formal suggestion from Mr. Abraham Clark of New Jersey. Mr. Hamilton was certainly the member who dratfed the address." Madison then observes that the legislature of Virginia was the first "that had an opportunity of taking up the recommendation, and the first that concurred in it. It was thought proper to express its concurrence in terms that would give the example as much weight and effect as possible; and with the same view to include in the deputation, the highest characters in the state, such as the governor and chancellor. The same policy led to the appointment of General Washington, who was put at the head of it."

The bill complying with the recommendation from Annapolis was written by Madison. This action was followed by appointments from other States, and finally, on February 21, 1787, the Congress passed what Madison called its "Recommendatory Resolution" giving, in effect, its sanction to the project of a Federal Convention to revise the Articles of Confederation. This removed the suspense which Congressional inaction had created. Thus the labors of Madison at last found fruition. Without his sagacity and persistence there would have been no Federal Constitution.

It is pleasant to picture this quiet and studious young man of thirty-six as he takes his place with the distinguished Virginia delegation in that body of eminent men who were to frame the political structure of the new nation. That he fully recognized the significance of the meeting, and his remarkable forethought, are apparent from the arrangement that he at once made to secure an appropriate record of its proceedings. "The curiosity I had felt," he said, "during my researches into the History of the most distinguished Confederacies, particularly those of antiquity, and the deficiency I found in the means of satisfying it . . . determined me to preserve as far as I could an exact account of what might pass in the Convention whilst executing its trust, with the

1. Letters to Noah Webster, October 19, 1804; March 10, 1826.

magnitude of which I was duly impressed . . . I chose a seat in front of the presiding member, with the other members on my right and left hands. In this favorable position for hearing all that passed, I noted in terms legible and in abbreviations and marks intelligible to myself what was read from the chair, or spoken by the members . . . It happened also that I was not absent a single day, nor more than a casual fraction of an hour in any day, so that I could not have lost a single speech unless a very short one." It was not until 1840 that this Journal of Madison was published, and to him we owe the most important document of the period. It is not the least of his services that he thus has given us the most direct approach to the intention of the makers of the Constitution.

But the calling of the convention and the reporting its proceedings, after all, derive their importance from the action which the convention takes. What was needed was not merely a feeling of urgent need, but a *plan* adequate to solve the most pressing problems and reasonable enough to triumph over the seriously divergent views of Men and States. Leadership naturally fell to Virginia, which had first adopted the recommendation of the Annapolis Convention and appointed delegates. And that Virginia was ready to assume the responsibilities of leadership, and again to justify it, was undoubtedly due in the main to Madison. He had a plan. It was called the Virginia plan, and it was the first presented to the Federal Convention. It was fittingly presented by Edmund Randolph, the Governor of the State and the head of its delegation. While the plan was appropriately developed in consultation among the Virginia delegates, Madison has been recognized as its principal author. Randolph himself wrote: "Before my departure for the Convention, I believed that the Confederation was not so eminently defective as it had been supposed." It was in the consultations which followed his arrival that Randolph reached the conclusion that a more thorough-going plan was needed, and with the knowledge of Madison's views, one can readily understand his share in producing the final conviction. The Virginia plan was taken as a basis for the debates in the Convention. While many of its important provisions were altered in the process of making the Constitution, it had the root idea of national government operating directly upon the people and not simply upon the States; that is, as Madison explained, "national with regard to the *operation* of its powers"; although limited in "the *extent* of its powers." The basic proposal of the Virginia plan was "that a National Legislature, a National Executive, and a National Judiciary, should be established." In thus providing for national power, supreme within its sphere, for a national legislature which should make laws binding upon the people as a whole in the same manner as the laws of the State within its sphere bound the people of the State, the plan went to the heart of the existing evils. It is not extravagant to say, as John Fiske has said, that "this was the supreme act of creative statesmanship which made our country what it is," and that "it is to Madison we owe this grand and luminous conception of the two co-existing and harmonious spheres of government." Neither the important modifications of the plan, nor the compromises which were necessary to secure the adoption of the Constitution, disturbed this central principle, which today no less than heretofore makes possible the government of a vast territory with a distribution of power adapted to the satisfaction of both national and local needs. In this fundamental respect Madison stands forth as the chief architect of our political structure.

I cannot undertake to dwell upon the proceedings of the Convention, but Madison's contribution consisted not only in a plan but in his effective participation in the debates. He brought to the Convention not only exceptional learning but cogency in argument. He made 161 speeches—a number exceeded only by Gouverneur Morris and James Wilson. The impression made by Madison upon his colleagues is thus described by William Pierce, a delegate from Georgia: "Every Person seems to acknowledge his greatness. He blends together the profound politician, with the Scholar. In the management of every great question he evidently took the lead in the Convention, and though he cannot be called an Orator, he is a most agreeable, eloquent and convincing Speaker. From a spirit of industry and application which he possesses in a most eminent degree, he always comes forward the best informed Man of any point in debate. The affairs of the United States, he perhaps, has the most correct knowledge of, of any Man in the nation."

Mr. Pierce also refers to Madison's "remarkable sweet temper," and the Convention profited by his practical judgment as well as by his tenacity of conviction. One of the compromises of the Constitution, that relating to the apportionment of representatives in the Congress on the basis of population, embracing the whole number of free persons and three-fifths of the slaves, was a contribution of Madison following the clause of a proposal made by him, and adopted by the Continental Congress in 1783, as a recommendation for an amendment of the Articles of Confederation. Despite the criticism to which this compromise was subsequently subjected, there can be no doubt that without it the formation of a national government with adequate authority would have been impossible. It should not, however, be overlooked that Madison stoutly opposed another necessary decision of the Convention as to the equality of the voice of the States in the Senate. He said that the Convention "was reduced to the alternative of either departing from justice in order to conciliate the smaller States, and the minority of the people of the United States, or of displeasing them by justly gratifying the larger States and the majority of the people. He could not himself hesitate as to the option he ought to make. . . . If the principal States comprehending a majority of the people of the United States should concur in a just and judicious plan, he had the firmest hopes that all the other States would by degrees accede to it." But by a close vote, Madison's position on this crucial question was disapproved, and the decision went in favor of the equal suffrage of the States in the Senate.

While Madison's paramount purpose was to rescue the people from the perils of an existing condition bordering on anarchy, and to maintain justice between the States, he was also intent upon preserving the rights of the States. In his view, it was through the Union that the States themselves were to be preserved. His conception was of the needs of a great people, and as he put it "the federal and State governments are in fact but different agents and trustees of the people, constituted with different powers, and designed for different purposes." Madison was seeking not to impair the necessary functions of state governments, but by conserving the essential interests of national security

and stability to make it possible for the people in their respective States to enjoy the advantages of the peaceful administration of their local affairs.

Madison very clearly recognized the necessity of providing for invalidating state legislation which might be repugnant to the federal authority as granted by the Constitution. The Virginia plan proposed to confer upon the national legislature the power "to negative all laws passed by the several States contravening in the opinion of the national legislature the Articles of Union." In describing the action of the Convention, Madison explained that "The obvious necessity of a controul on the laws of the States, so far as they might violate the Constitution and laws of the United States left no option but as to the mode. The modes presenting themselves were: 1. A Veto of the passage of the State laws. 2. A Congressional repeal of them. 3. A Judicial annulment of them. The first tho' extensively favored at the outset, was found on discussion, liable to insuperable objections arising from the extent of country and the multiplicity of State laws. The second was not free from such as gave a preference to the *third* as now provided by the Constitution." And again, referring to what he termed the "supremacy of the Judicial power" in this respect, Madison said, in one of his latest writings, "I have never ceased to think that this supremacy was a vital principle of the Constitution as it is a prominent feature in its text. . . I have never been able to see, that without such a view of the subject the Constitution itself could be the supreme law of the land; or that the *uniformity* of the Federal authority throughout the parties to it could be preserved; or that without this *uniformity,* anarchy and disunion could be prevented." That was Madison's view of the essential function of the Supreme Court of the United States. It was very clearly expressed in a letter to Jefferson in 1823, when he sent to Jefferson a copy of his letters to Spencer Roane, a correspondence growing out of the decision in *Cohens* v. *Virginia,*[2] holding that the Supreme Court had jurisdiction on a writ of error to a state court in a state criminal prosecution. Madison had there said: "The Gordian Knot of the Constitution seems to lie in the problem of collision between the federal and State powers, especially as eventually exercised by their respective Tribunals. If the knot cannot be untied by the text of the Constitution it ought not, certainly, to be cut by any Political Alexander."

Without attempting to review the history or content of the Virginia Resolutions of 1798, which Madison drafted, or the Kentucky Resolution of the same year, it is sufficient for the present purpose to say that when South Carolina in 1832 passed its Nullification Ordinance, Madison disclaimed any intention of preparing the Virginia Resolutions to support what he called "the colossal heresy" of the nullifiers or to express disapproval of the jurisdiction of the Supreme Court in passing upon the validity of the legislation of the Congress. What he had in mind was a common protest by the States against federal legislation deemed to be in excess of the power of Congress. As he said in his Report on the Virginia Resolutions: "The declarations in such cases are expressions of opinion, unaccompanied with any other effect than that what they may produce on opinion by exciting reflection. The expositions of the judiciary, on the other hand, are carried into immediate effect by force. The former may lead to a change in the legislative expression of the general will—possibly, to a change in the opinion of the judiciary, the latter enforces the general will, whilst that will and that opinion continue unchanged." Madison believed that "the nullifying claims if reduced to practice, instead of being the conservative principle of the Constitution, would necessarily, and it may be said obviously, be a deadly poison."

The Constitution as adopted by the Convention did not conform in all respects to Madison's views, still less to those of Hamilton. But both, yielding to a conviction of the paramount necessity of ratification, united in a collaboration of luminous reasoning and persuasive argument which has no parallel in political literature. The papers of the Federalist are an enduring monument to the intellectual power and patriotic zeal of both Hamilton and Madison. Whatever their later differences, in the cause of the ratification of the Constitution they worked as one. And there was need of their best efforts. While Madison observed that "the case in Virginia seems to prove that the body of sober and steady people, even of the lower order, are tired of the vicissitudes, injustices and follies which have so much characterized public measures, and are impatient for some change which promises stability and repose," the opponents of ratification were formidable. In Virginia the situation was critical. "The General and Admiralty Courts, with most of the Bar," said Madison, "oppose the constitution. . . Mr. Henry is the great adversary who will render the event precarious." Madison thus had the opportunity of crowning his service in the Convention by his defense of its work. In the opposition along with Patrick Henry were found such antagonists as Richard Henry Lee, George Mason, James Monroe and Benjamin Harrison. Madison had the advantage of precise and comprehensive knowledge of his subject. Beveridge gives us a striking picture of Madison's appearance as he rose to speak: "The chair recognized a slender, short-statured man of thirty-seven, wearing a handsome costume of blue and buff with doubled straight collar and white ruffles on breast and at wrists. His hair, combed forward to conceal baldness, was powdered and fell behind in the long beribboned queue of fashion. He was so small that he could not be seen by all the members; and his voice was so weak that only rarely could he be heard throughout the hall. Such was James Madison as he stood, hat in hand and his notes in his hat, and began the first of those powerful speeches, the strength of which, in spite of poor reporting, has projected itself through more than a hundred years." With the decisive influence of Washington's support, the Constitution was ratified in the Convention by a slender majority. While New Hampshire's ratification had given the requisite nine State votes, failure in Virginia would probably have been followed by failure in New York, with most serious consequences.

Yet, even with that success, Madison's labors for our constitutional system were not ended. There was widespread dissatisfaction because of the absence of a Bill of Rights. Madison had not seen in the Constitution those serious dangers "which alarmed many respectable citizens," but he welcomed the opportunity to demonstrate anew his devotion to individual liberty. Accordingly, in the first Congress under the Constitution, he proposed the amendments which should satisfy "the public mind that their liberties will be perpetual." These had the provisions which are now found in substance in the first ten Amendments to the Constitution. In thus maintaining, as against interference by the

2. 6 Wheaton, 264.

Federal Government, the rights of freedom of conscience, of speech, and of the press, of trial by jury, and immunity from unreasonable searches and seizures, in providing the guaranty against deprivation of life, liberty and property without due process of law, Madison had in mind protection against both Legislature and Executive, and for the maintenance of these guarantees he relied upon an independent judiciary. "If," said he, in proposing the Amendments, "they are incorporated into the Constitution, independent tribunals will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." Thus Madison, who had insisted upon adequate national power operating directly upon the people, and that the new constitutional government must be "founded on the people" through ratification in state conventions chosen in each State, justifying the inspiring words of the Preamble—"We the people of the United States" —evidenced his deepest conviction that the ultimate purpose of the Constitution was to maintain the security and the opportunity of the individual citizen.

Madison had read too widely and had thought too deeply to put his ultimate trust in any form of words, even if they were endowed with the solemnity of a Constitution and were formulated and approved with the utmost deliberation. Political wisdom might erect the structure, but the result would depend upon the use that was made of it. Madison had no illusions as to the source of the dangers to the interests he had sought so earnestly to safeguard. Power could always be abused. "Wherever the real power in a Government lies" (he remarked in a letter to Jefferson in 1788), there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents. . . Wherever there is an interest and power to do wrong, wrong will generally be done, and not less readily by a powerful and interested party than by a powerful and interested prince."

In his preparation for the Great Convention, Madison had voiced the perennial complaint of the multiplicity of laws. His comment upon this evil of his own time is not without an amusing aspect in the light of the conditions of our day. Said he, "As far as laws are necessary to mark with precision the duties of those who are to obey them, and to take from those who are to administer them a discretion which might be abused, their number is the price of liberty. As far as laws exceed this limit, they are a nuisance; a nuisance of the most pestilent kind. Try the Codes of the several States by this test, and what a luxuriancy of legislation do they present. The short period of independency has filled as many pages as the century which preceded it. Every year, almost every session, adds a new volume!" But it was the injustice of the laws as he found them that gave him the greater anxiety. As he put it, "If the multiplicity and mutability of laws prove a want of wisdom, their injustice betrays a defect still more alarming; more alarming not merely because it is a greater evil in itself; but because it brings more into question the fundamental principle of republican Government that the majority who rule in such governments are the safest Guardians both of public Good and private rights." And "the great desideratum in Government" he thought to be "such a modification of the sovereignty as will render it sufficiently neutral between the different interests and factions, to controul one part of the society from invading the rights of another, and at the same time sufficiently controuled itself, from setting up an interest adverse to that of the whole Society."

The problem of securing a just and efficient government is far more difficult today than when Madison made these observations. It is the irony of the present situation, that in the hour of the apparent triumph of democracy, when the rule of peoples instead of monarchs was thought to have been made secure, there should be the most serious challenge of democratic ideals. The challenge is more fundamental than one to the particular forms of democratic or republican institutions. It is a challenge to the efficiency, wisdom and justice of popular rule carried on through the instrumentalities of responsible legislators and administrators. Whether the attack is in the interest of the State conceived as the protector of the social interests of all the people, or it is motivated by class consciousness in a particular interest, there is common ground in denying the capacity of the people to make laws and to execute them through representatives freely chosen without dictatorship. For the delays and ineptitude of parliaments it is sought to substitute the promptitude and vigor of Executive power, and self-constituted authorities assume the responsibility of supplying the intelligence which government by the people is said to lack.

The challenge is not simply to the democratic principle with respect to the source of authority in government, but to the ideals of liberty. For the alternative to democratic institutions is found in despotic power, whether or not exercised with benevolent intent. The final questions are the extent to which governmental coercion is to be permitted to proceed and who is to be allowed to exert it. It was the ideal of the fathers that our government should be repesentative and responsible; that our institutions should provide unity and stability, with the limitation of national power to appropriate national ends and with the circumscribing of both federal and state authority in order that a fair freedom of individual opportunity might be preserved. There is no indication that we desire to abandon this system in favor of any form of autocracy, whether contrived to promote efficiency or to establish class rule. With all the imperfections of our institutions we have not yielded to despair. We desire to foster our collective interests, but we have not yet been persuaded that we should be the gainers in the end either by subordinating all individual concerns to the wholly uncontrolled will of the majority or by submitting to any sort of dictatorship.

We cannot fail to realize, however, that our governmental system is most complex. It makes extraordinary demands upon intelligent political activity and upon capacity for self-restraint. We cannot save ourselves by worshipping the forms of our institutions if we fail to make them serve our just interests. Success in solving our problems lies in a wise application of Madison's controlling principle of the maintenance of a strong national government together with the essential authority of the States over their local affairs, and with constant respect for those individual rights which

experience and conscience teach us should be inviolable. It was preeminently the political genius of Madison which has given us opportunity, and we shall profit in our use of it to the extent that we emulate his example in making reason, and not emotion, our guide. We need leadership in thought even more than leadership in action. And to James Madison, who gave that leadership when it was needed most, we render our homage.

REVOLUTIONS AND THE PROFESSION

When a New Social Order Is Established by Popular Uprising the Lawyers Are Early Victims—In France the Profession, in Spite of Hardships, Had Little Difficulty in Eventually Regaining and Keeping Its Ancient Place in the French System —What Happened in Russia—Courses Open to Lawyers—Judicial System Still Frankly Instrument of Proletarian Propaganda.*

By Anan Raymond
Member of the Chicago Bar

IN a stable society, revolution is an improper topic of polite conversation. Ten major revolutions in twenty years, affecting half the world's land area and population, have none the less pushed the thought of it sharply into the foreground of the Western mind. This discussion has to do, briefly, with what has happened to law and lawyers in the course of one or two of the notable revolutionary changes of the past. It contains nothing not stated much better elsewhere, and nothing with which students of legal history are not thoroughly familiar. At most it may suggest speculation as to the function, the status and the future of our profession, in a world wherein the certainty of change is the only certain thing.

One of the shorter definitions of revolution, and one which may serve to define a point of view, is "A change brought about not necessarily by force and violence, whereby one system of legality is terminated and another originated." The amount of such change, both violent and non-violent, which our generation has witnessed, calls for some decent restriction upon the scope of a discussion such as this. We must limit ourselves to cases in which the effects of revolution are ascertainable. We must omit those which afford no definite point in time or events from which an inquiry can be oriented. Circumstances and backgrounds must afford at least some analogy to our own. In particular, we must place in a category by themselves the revolutions for which the legal profession itself was largely responsible. In such category the English Revolution, the American Revolution, and the industrial revolution of the Nineteenth Century would probably belong. In those instances, the stars in their courses have been on the same side as the lawyers.

When a new social order is established by popular uprising, however, lawyers are early victims. Shakespeare, picturing The Jack Cade rebellion, in 2 Henry VI, Act 4, Scene 2, makes Dick, the butcher, say, "The first thing we do, let's kill all the lawyers." In all earlier stages of radical dictatorship, realization of this aim is one of the agenda. Of such upheavals, the French Revolution is typical. Its events and personalities were so dramatic as to stand out boldly upon the perspective of history. Its results were so definitely measurable as almost to establish a normal for the pains, the penalties, and the benefits of revolutionary change.

The chief characteristics of the pre-revolutionary period were an archaic feudalism, to whose outworn privileges royal despotism was the keystone; inequality in the status of persons and in land ownership; obstacles to industrial freedom, commerce and industry; oppressive taxation; and the mercantilistic and protectionistic theories. The revolution's ideal aim was individualism,—the greatest possible liberty in the individual, with the state exercising its influence only the better to insure the development of his faculties. This ideal aim was developed by the intellectuals of the time, by rationalization with respect to current political and economic ills. That is, it was at first a purely intellectual concept, as the doctrines of Marx were a century later. Though diametrically opposed in intellectual content, the two theories, in 1789 and 1917 respectively, produced identical objective symptoms in their votaries.

When upon the destruction of the French monarchy and the assumption of control of the Assembly by the radical wing, the old order was in theory destroyed, the roll of the Ordre des Avocats in Paris contained 627 names. There were also avoués and jurisconsults in large numbers. Their fate was similar to that of the advocates, and the history of the advocates' order is the key to the whole profession's revolutionary status. The Assembly immediately proposed that every one disregard the artificialities of judicial science, and revert to the law of nature. When the revolutionary court was established, the law of defense not only did not exist, but was expressly repudiated. "The calumniated patriot," says one, "will have for defender the conscience of sworn patriots; the others

*Address delivered before the Law Club of Chicago on Nov. 6, 1931.

are only conspirators because of whom the law does not need to be perturbed."

All that remained of the old corporation of lawyers disappeared. Bergasse, advocate from Lyon, had vainly demanded in the name of the Committee of the Constitution, that in declaring that the lawyers should discontinue their formal corporation, they should also exclude certain studies and examinations conducted by the lawyers. The Assembly went even farther. It decided on December 2, 1790, that the men of the law "heretofore called avocats" should be prevented from forming either an order or a corporation; and that citizens exercising the function of the advocate should not wear any particular costume therein. The suppression of the robe meant the death, absolutely and without choice, of the order.

"The new judicial organization," wrote Bonnaire and Delacroix-Frainville, "does not provide for sovereign courts; one sees instead petty tribunals which alternatively play the roles of courts of appeal. These will be those which will give the investiture to lawyers and each tribunal will become a center of a Bar. These Bars will be furnished with a quantity prodigious of men who without any idea of our principles and our discipline will disgrace our honorable functions and will degrade them from their ideals. * * * The sole means of escaping from this dangerous outcome is to suppress on the spot the denomination of avocat, of order, and the attributes which depend thereon. Let there be no more avocats as soon as we shall have ceased to be such. Sole depositary of a noble estate, let us not allow it to be debased in passing into hands which will destroy it; let us not have successors unworthy of us; rather let us exterminate the object of our affection than to deliver it to outrage and dishonor."

This gloomy view of the situation was justified by the event. The order itself dispersed; but about 150 lawyers met again to form a sort of association. Under the names of "men of the law" or, as the public called them, "associated old regime lawyers," or "lawyers of the Marais," by reason of the neighborhood in which many of them lived, they held themselves ready to assist persons who under the decree of December 15, 1790, were authorized to employ "the aid of an official defender for their defense, be it verbal or written." Ferey was the President of this subrosa bar association. His house became its rallying place. One would find there Delacroix-Frainville and other lawyers of the old school, with a group of young men; and all held themselves bound by the old professional rules, although these rules were now deprived of all legal force.

These lawyers guarded themselves as well as they could against contamination from contact with the official defenders authorized by law—"agents of suspicious affairs" and "jurisconsults by chance." These jurisconsults were of an ideal ignorance; they knew nothing; and the law less than the rest. They occupied themselves with political intrigue, gambling on the market, and other dissipations, rather than with litigation. The old time lawyers were not surprised to note one day that "Mr. X, jurisconsult, has taken banqueroute"—a disgraceful species of bankruptcy which to a real lawyer would have meant the loss of his robe, and professional ostracism.

On the 3d Brumaire in the year 2 of the revolution these state lawyers were suppressed in their turn, and citizens were authorized to employ simple legal representatives, from whom was required merely a certificate of citizenship—but "wretched indeed was he who could not produce it!"

In the midst of all these tempests the abuses resulting from the new order of things, including the wholesale and unashamed corruption of both bench and bar, passed unobserved. Little by little they became so patent a matter of public disgrace that efforts were made to remedy them. In the fifth and sixth years of the revolution the Council of 500 occupied itself with various projects for judicial reform. These proposals died still-born. The Council's most serious attention was upon the foreign wars, the rapid succession of revolutionary dictatorships, and the depleted revolutionary treasury.

By the year 10 of the revolution, however, the lawyers of the old corporation had tacitly taken over practically all of the functions of the official defenders, jurisconsults, and pleaders or counsel authorized or established by the revolutionary decrees. In the year 11 a decree forbade the men of the law to wear ordinary citizen's costume in the revolutionary courts. They had now to appear clothed in a toga of wool closed in the back, with large sleeves, with a black cap, and with a neck cloth similar to that worn by the judges, and with hair long or in curls. The official rebirth of the new bar could not much longer be delayed.

The law of March 17 in the year 12 reorganized the law schools, and even permitted the use of the name avocat. It imposed on whomever would exercise the functions of a lawyer the duty to show either a diploma with a degree above that of bachelor, or letters of license. It prescribed the formation of a list of lawyers. And, as all precautions are good to take, it prescribed a professional oath, still in use, "to say or publish nothing as defenders or as counsel, contrary to the laws or to the rules, or good custom, against the safety of the state and the public peace, and never to lack respect for the courts and public authorities."

The coup d'état of 18th Brumaire established the Consulate. Napoleon regarded all advocates, jurisconsults and pleaders, whether general or special, with a deep and profound hatred and contempt, which persisted to the last days of his exile on St. Helena. Like any other liquidator, however, he found himself totally unable to get on without them. The legislative work of the new regime was immense. The recodification of the Codes was imperative. The work of the courts was in hopeless confusion. The domestic stability of the Consulate and the Empire brought about a tremendous increase in the volume of commercial transactions, to which certainty of legal rights and remedies was a prerequisite. In all this work the reorganization of the bar as a profession was to find its place; and the profession as a whole was to enter upon a period of unprecedented prosperity.

In the meantime, of course, many lawyers of the old régime had gone to the guillotine, through

loyalty to clients, or attachment to the old order of things. Many others found positions of leadership in the revolutionary assemblies. Mirabeau, Danton and Robespierre are outstanding examples. Still others entered the new government services and stayed there throughout the revolutionary period, shifting from party to party with a facility for which their experience with clients perhaps had prepared them. But for lawyers as a class it had been a period during which they were often fugitive, often imprisoned, and nearly always hungry.

In spite of his distrust of lawyers, Napoleon, with his intense and characteristic practicality, determined to ameliorate a necessary evil, to the extent which safeguarding the character and learning of members of the profession would do so. He established law schools on a firm and well regulated basis, and restored the profession of advocate, though under severe restrictions. The Code Napoleon, whatever credit may be due the Emperor for promulgating it, is in reality a monument to the legal learning and patriotism of Tronchet, Bigot de Preameneu, Simeon, Portalis de Malleville and other members of the French Bar. The Civil Code, promulgated at intervals during 1803 and 1804; the Code of Judicial Procedure in civil cases in 1805; the Commercial Code in 1807; the Code of Criminal Procedure in 1808 and the Penal Code in 1810, formed together the great legislative work of the Consulate and the Empire, and in large degree embody the net gain of the revolution to the French people.

To many eminent jurists and consulting advocates Napoleon showed much favor. But he never overcame his distrust of the free speech of the avocats plaidants. He neither forgot nor forgave the intrepid defense of Moreau, of the Marquis de Riviere, and of others of his political enemies, by some of the most eminent of their number. Insult was added to his injury by the fact that in Paris only 3 advocates out of 200 voted affirmatively for the resolution establishing the Empire in 1804. During his entire career he decorated but one lawyer, Ferey; and not a single advocate appeared upon the original roll of the Legion of Honor in 1802. In the early days of the Empire he denounced a decree for the reconstitution of the Ordre, saying, "This decree is absurd. It leaves no holdover, no action against them; they are the framers of crimes and treasons. As long as I have a sword by my side I shall never sign such a decree."

Not until 1810, was the Ordre formally and officially recognized. The decree, while placing it absolutely and entirely in the power of the government, was none the less couched in terms highly honorable to the Bar:

"When we occupied ourselves with the organization of the judicial order and with the means of securing to our courts of Justice the high consideration which is their due, a profession which exercises a powerful influence upon the administration of justice attracted our attention. We consequently ordained by the law of March 22, 1804 the re-establishment of the roll of advocates as one of the means calculated to maintain the integrity, the delicacy, the disinterestedness, the desire of conciliation, the love of truth, the enlightened zeal for the weak and the oppressed which are the essential foundations of their order. In now retracing the rules of that salutary discipline of which the advocates showed themselves so jealous in the palmy days of the Bar, it is proper, at the same time, to insure to the magistracy the superintendence which should naturally belong to it over a profession with which it is so intimately connected. We shall thus have secured the liberty and the nobility of the profession of advocate, by fixing the limits which ought to separate it from license and insubordination."

The decree which followed accorded none too well with these high sounding words. It deprived the Bar of the privilege, for which it had so often, so vigorously, and so successfully contended, of being exclusive guardian of its roll of members. Another article forbade advocates to plead beyond the limits of their own courts, without authority from the Minister of Justice. Another fixed a three-year period of probation, and required an oath of obedience to the Constitution of the Empire and of fidelity to the Emperor before entering upon it.

In spite of these hardships, the lawyers, except for the brief period when they were displaced by rogues and scoundrels, had little difficulty, under the Directory and Consulate in regaining, and under the Empire in keeping, their ancient place in the French system. Not long after Waterloo their ancient privileges were fully restored. Subsequent changes in the form of the French government have not disturbed them. Though they were influential in the revolutionary councils and the constituent assembly, they owed their return to importance not so much to their own efforts, as to the rascality and utter incompetence of those who sought to displace them. Once the citizenry had lost confidence in these amateurs, the way was open to the restoration of the exclusive rights of avocats and avoués.

When stability was finally and permanently restored, the Codes, which were their work, remained as the net accomplishment and gain of the revolutionary period. The Codes were based directly upon that theory of individualism, which was the framework of the revolutionary ideology. They embodied that idea of the absolute and exclusive quality of property, and of ownership as an inherent right, which is still the keystone of French individualism. Their purpose and their effect was to consolidate and protect the rights of the middle classes, who had had the greatest economic stake in the revolution. It is the impact upon those rights of the collectivistic doctrines of the late Nineteenth Century which accounts for the revolutionary disturbances of today.

It is but a truism that the rigidly individualistic conception of property and personal rights, which underlay the French Revolution, is disappearing from modern thought, even in France. Collectivism, in its various forms, might have developed naturally, and a fair balance between individual rights and social needs might have been struck, but for a new concept—that of the class war, with the state as the legitimate instrumentality of but a single class. Like individualism, it started as a purely intellectual concept, arrived at by rationalizing in a closet. When circumstances combined to put the Russian government into the hands of men disposed to try it out in practice, the Russian Revolution was the result.

As to this revolution, which is still going on, the testimony of eye-witnesses is in such hopeless conflict, that apology for the use of hearsay is hardly necessary. Conclusions can be reached only by treating as established whatever is not too violently disputed. On this basis, it appears that when the Kerensky government was ousted in October, 1917, the lawyers, who for the most part had been

his adherents, struck against the new government. The codes, criminal and civil, ceased to operate. The courts no longer functioned. Litigation in progress was arrested and disputes of all kinds remained unsettled.

The lawyers' strike was futile, in view of the total abolition of the old judicial system within a month after the Bolsheviks came into power. Their present system of administering justice dates from a decree of November 24, 1917, establishing a system of "people's courts." This decree automatically destroyed the old system of courts of justice. The old and the new were diametrically opposite. The frequently stated purpose of the new system was the establishment of class justice, and the deprivation of all but the toiling masses of any legal rights or protection. The decisions of the new people's courts, composed exclusively of workers and the poorer peasantry, were to be final. The system of appeals was abolished on the ground that it is nonsense to have the same case tried several times. The District Congress of local people's justices, however, could reverse decisions of the local courts, on the ground either of illegality or of non-conformity with revolutionary theory.

For a long period nothing was done to carry out this decree; and the local authorities organized people's courts of the new type, or not, as they pleased. The principles of the old Russian jurisprudence may have been, and no doubt were, indefensible, and its mechanism archaic; but it was at least a working system, which the revolution brought to a complete stop. Notwithstanding the abolition of private property, people had unsatisfied claims in respect of personal services and possessions. Criminals were arrested and held for trial, for violation not only of the old codes, but also of the new laws which were being issued in great and confusing volume every day. Yet there were no courts, and accused persons remained in prison without trial for indefinite periods.

As a result justice in Russia was for a considerable period administered by at least three types of tribunals: the revolutionary tribunals set up to try persons accused of counter-revolutionary activities, the committees of local Soviets, and the newly created people's justices. These tribunals were soon flooded with all kinds of business, which they were wholly incompetent to handle. Early in 1918 the Central Committee at Moscow made an effort to organize the Commissariat of Justice. There was left of the old judicial ministry only a few clerks. Hence an entirely new personnel had to be created. The first head of the new Commissariat was Steinberg, who had been a radical revolutionary, with two assistants, Schröder and Algasov, of the same group. The Commissariat was then divided into three departments, for civil, criminal and administrative affairs. The first head of the civil department was Krasekov, also an extreme Bolshevik, who before the revolution had been a lawyer with an extensive criminal practice. With him was a staff of assistants and secretaries, including a chief consultant, who was the working head of the department. As the old Senate had been abolished and no other court of appeal had been established in its place, the Commissariat constituted itself the court of appeal for cases before the Senate, or on their way there, at the time of the Bolshevik triumph. At least one-half of them related to property in land and were automatically dismissed when the land was nationalized.

The Commissariat, of course, included some more or less qualified persons, and when a case reached it on appeal there was some chance that justice would be done. For a long time, however, it had no machinery for enforcing its authority, and the force of its decisions depended entirely upon the good will of the local Soviet authorities. The revolutionary tribunals, the new people's justices and the Soviet committees, who were rendering the local decisions, were soldiers and laborers. Like the revolutionary judges in Paris a century and a quarter earlier, they were of an ideal ignorance—uneducated in the literal sense of the word. They gave their decisions, not in accordance with the principles of law, for they knew none; and not even upon any knowledge of the principles laid down by the Central Soviet at Moscow; but "by the light of their revolutionary state of mind."

Even where the local judges were qualified, either by training or by a desire to render justice, they were handicapped by the indifference, incompetence or actual depravity of local authorities and police officials. Occasionally an examining magistrate received communications such as this:

> "The Executive Committee wishes to let the citizen examining magistrate know that the notice summoning the witness was not delivered to that person, as the Committee knows that he does not know anything about the case."

Another local magistrate received the following statement:

> "I, C. D., revolutionary inspector of militia of E. region, examined on (such a date) citizen F. G. of H. village, who was accused of burglary. The latter did not plead guilty. Considering that the best proof of guilt is self-consciousness, and that as this was not shown by the accused person, I thought the best thing to do would be to make an assay. Therefore I ordered some straw to be brought and the soles of his feet to be burnt. (Signed) C. D., Head of the Militia. P. S.—The assay gave splendid results: the accused confessed."

In the midst of this confusion and uproar the disaster to the legal profession was merely more complete and far reaching than in similar stages of the French Revolution. The last professional meetings in Petrograd were held early in 1918, when the principal topic of discussion was "obligatory labor," which the Soviet had imposed upon every one not already enrolled as a manual worker. The outcome was that lawyers in the capital continued their strike and refused to aid the non-professional courts. Later most of them throughout Russia followed the same course, though some of them continued in the precarious and dangerous practice of advising clients on their own account and actually appearing for them. As a profession, however, the law in Russia was in effect destroyed.

Dr. Alexander N. Sack, visiting professor of law at the Northwestern University Law School, who practiced law in Russia before the revolution and escaped from the country some time afterward, is authority for the statement that after the abolition of all previous law and of the profession of the bar as such, the choices open to Russian lawyers were three: They could try to leave the country, and so many succeeded that there are now in Paris, and in Europe generally, numbers of former Russian lawyers estimated all the way from scores to hundreds. They could profess loyalty to communism and to the Soviet government and apply

for membership in the Corporation of Defenders. They could attach themselves to some of the various government industrial or commercial enterprises, all of which had use for lawyers in advisory capacities. This work, apparently, amounted to an intellectual coolieship, in so far as regards the dignity and importance of the positions available. Pending this choice, those suspected of disloyalty to the Soviets were exiled or shot. Many others perished in the local uprisings in which the proletariat revenged the real or fancied wrongs of the past.

The Corporation of Defenders just referred to was created about a year after the Soviets took over control of the Russian government. Its members are appointed by the Commissariat of Justice and each paid a regular salary, like any other Soviet official. Since its establishment no lawyer can appear as the legal representative of any one accused of crime unless he belongs to this official group. Conversely, lawyers collecting fees for trial of civil cases must serve in any criminal cases which the State appoints them to defend. If the accused does not himself select a defender from such group, the tribunal appoints one for him. Hence the Corporation of Defenders has in effect a monopoly of legal practice.

Most of the able lawyers at first refused to accept appointment to this body. For many years they stood out against the Soviets as perhaps no other single group in all Russia. More recently, as the Soviets have remained in power, and as the prospect of fundamental change has seemed increasingly remote, larger numbers have drifted into the Corporation of Defenders, the government-managed enterprises, or other governmental positions.

As nearly as can be determined from conflicting reports, these employments offer compensation ranging from about 60 rubles per month, in the smaller towns, to 120 rubles in larger places, and about 150 rubles in Moscow. In American terms, these figures fix a lawyer's social value at from $30 to $75 per month.

Since 1918 Russian courts have been organized on a more permanent basis. Civil and criminal procedure were codified in 1923. The people's courts remain the foundation of the system, with jurisdiction over minor offenses, and civil jurisdiction up to 5000 rubles. Above them are the circuit courts, and district or provincial courts; and in each of the seven Soviet republics, a Supreme Court, which in some cases is the same as the provincial court. The only "federal" court in the American sense is the Supreme Court of the U. S. S. R., whose functions are mainly administrative. There are also various courts of special jurisdiction, such as the Land Court and Arbitration Court. Special criminal tribunals, including the famous Cheka, have also been established. Professional law training is not required of judges, though two years' experience as a people's justice is required of members of the circuit and provincial courts. No one is eligible for judicial office unless a political voter—that is, unless enrolled as a member either of the communist party or of the working class. The purpose of these measures was and is to recruit the higher judiciary from the proletariat and train them in the people's courts. These home-made Marshalls and Kents are now being supplanted to some extent by lawyers who have gone over to the new order, and by younger proletarians who have had formal legal training in the universities. In 1928 the Supreme Court of the R. S. F. S. R. at Moscow had 45 judges. Eighteen of them were lawyers, some of them of great reputation both before and since the revolution.

In both theory and practice the Russian system remains revolutionary in character, with individual rights and remedies as such, completely subordinated to those of the state. The judicial tenure of office is entirely dependent upon the executive. The "highest judicial control of the Commissariat of Justice" may quash any decision of the courts as contrary to the established principles of the Soviet legislation and general powers of the Soviet regime.

Hence, while there has been progress in the orderliness of judicial administration, the entire system of jurisprudence still remains, openly and frankly, an instrument of proletarian propaganda. According to the soviet formula, the courts are but a means of guaranteeing the defense of the interests of the workers—one merely of the weapons of social force and constraint with the aid of which the proletariat "realizes its political sovereignty and guards its economic sovereignty."

These same class theories permeate the codes themselves. All of them have loop-holes for "the revolutionary conscience of judges." Contracts between individuals may be voided if the court finds that when made they involved any "disadvantage to the state." In tort actions the court may in its discretion make the defendant respond "according to the economic condition" of the parties, regardless of legal responsibility. Criminal sentences are based, not at all upon the gravity of the crime as such, but upon what the court considers the "social danger" of the accused. Thus the maximum penalty for murder is imprisonment or exile for eight to ten years, while counter-revolution is punishable by death, and under the present code is the only capital offense. What is sometimes called the "sporting theory of justice" has been definitely discarded. There are no rules of evidence, and the judge must take cognizance of all relevant matters, whether presented by the parties or not.

In spite of the nationalization of property and the removal of many of the subjects of litigation in a capitalistic society, the Russian people continue to transact a large volume of business in their courts. In 1926, for example, the people's courts disposed of 2,082,831 cases, of which 186,731 dealt with breach of contract, 141,697 with damages to property, 102,717 with divorces, and 882,472 with miscellaneous litigation. During the same year the regional or provincial courts disposed of 18,848 cases, of which 7,898 dealt with breach of contract, 2,323 with property damages, and 6,420 with miscellaneous matters. In the same year the people's courts tried 1,432,077 criminal cases and the regional courts 115,378. It may be noted in passing that of the criminal cases 50,753 in the people's courts and 52,295 in the regional courts were trials for malfeasance in office by governmental officials.

While statistics for later years are not available, other evidence indicates that the volume of litigation in Russian courts is increasing rather than decreasing. In short, it is apparent that the Russian

revolutionaries, like their French predecessors, found codes of law and machinery to enforce them indispensable to the stability of even a socialistic system. As one observer has put it, their jurisprudence is following conventional lines of development, even though it may have unconventional characteristics. It may also safely be assumed that such a mass of litigation is not going through the courts without the assistance, overt or subrosa, of such Russian lawyers as are still in Russia. Whether the liquidation and stabilization period of the Russian Revolution has arrived or is yet to come, it is inevitable that, the farther its doctrine is applied in practice, the greater will be the need, in such application, of trained legal intelligence.

To attempt to draw from France and Russia any analogy which might apply to revolutionary upheaval in this country is perhaps a breach of etiquette. The thought of American lawyers, guillotined in the market place, or facing firing squads in the cold gray dawn of a revolutionary morning, is too horrendous even for after-dinner speculation. Change is inevitable, and our choice is, not between the old and the new, so much as between those new systems established by natural, if painful, evolution, and those ushered in by violence and destruction. New systems of the former sort the lawyer has always taken control of and profited by. For nearly a century and a half the American lawyer in particular has succeeded in protecting the established order against destructive attack, while shaping and purifying the forces of change. In these respects, history will no doubt repeat itself.

But in the remote but not impossible event of violent revolution, history likewise foretells our professional fate. "The men of the law," says Trevelyan, "seem to have been massacred sometimes for no better reason than for belonging to that unpopular profession. Their services to society are never in any age very obvious to the vulgar, while the injuries they inflict are patent; as instruments of oppression they stand in the place of the tyrants who employ them and the legislators whose laws they enforce." Harsh words, no doubt; yet in essence but a posit of the axiom that in any legally constituted and settled society, sovereignty cannot be exercised without us. Our prime function is to implement the existing order. Its sudden destruction in terms implies our own.

Many of us, then, will lose our lives in defense of things as they were. Others of us will write the revolutionary manifestoes, preside over the revolutionary assemblies, and codify into law the revolutionary theory. Many of us will bury our opinions, take posts, obscure or prominent, in the service of the new government, and remain on the government pay roll long after the revolution has been liquidated. All of us who survive will for several years be extremely uncomfortable; and the prerogatives which, as a profession, we now exercise, will temporarily be taken over by ignoramuses and scoundrels,—most if not all of whom, we are entitled to believe, will be recruited outside our own ranks. No theory of government or economics, however, can in practical operation long endure, in violation of the fundamental rights or the common sense of the average citizen. That common sense, reenforced by sheer necessity, will again in due time restore to their legitimate sphere the prerogatives and influence of men learned in the law.

Meeting of Section of Legal Education

THE recent meeting of the Section of Legal Education and Admissions to the Bar at Atlantic City was occupied mainly with a discussion of the teaching of professional ethics. Mr. George H. Smith, the Chairman, opened the meeting with a paper dealing with the work of the Council during the last year, including a discussion of some of the unusual features of the Albany Law School, the Duke Law School and the Howard University Law School, which were approved during the past year. Mr. Smith also pointed out that during the past year in five states general educational qualifications for admission to the bar had been increased, in one state the period of legal training had been increased, and in three more states power had been placed either in the Supreme Court or in the governing body of the state bar with the consent of the Supreme Court, to fix the qualifications for admission.

Dean Wigmore read a paper on "The Development of a Course in the Profession of the Bar," in which he showed how the teaching of professional ethics could be successfully and interestingly combined with the study of legal biography and with professional problems involving the place of the lawyer in modern society. This method of combining the study of professional ethics with other related material is being used at Northwestern University as well as some other law schools, and will undoubtedly have a considerable influence in bringing about the teaching of this subject where it is now neglected.

The next speaker, Mr. Robert T. McCracken, Chairman of the County Character Committee of Philadelphia County, dwelt on the experience which Pennsylvania has had in examining the character of applicants for admission to the bar. He favored the giving of a law school course in professional ethics, but it was his opinion that this alone was not sufficient, and that actual clerkship and guidance by a preceptor were necessary in order to make a law student realize what problems in professional ethics were and how to deal with them. He explained in detail the admirable system which Pennsylvania has for testing the character of candidates for admission to the bar.

The last speaker, Mr. Silas Strawn, spoke on "Practical Ethics," interpolating some of his experiences as a member of the Committee on Character and Fitness in Illinois.

A uniform set of by-laws as recommended by the Executive Committee was adopted by the Section, and the report on the subject of bringing law students into closer contact with lawyers of high standing, made by the Council to the Section, was received and adopted. A resolution by Mr. Gleason L. Archer that half of the law teaching in approved schools be conducted by lawyers in active practice or who have had at least ten years experience in active practice was lost.

LAWLESSNESS IN LAW ENFORCEMENT—NO. 11

Review of Report on Subject by Commission on National Observance and Law Enforcement—Report Based on Reported Cases, Examination of Appeal Briefs, Survey of Books and Essays and Information Gathered During Investigation of Third Degree—Recommendations by Reporters—Extent of Third Degree Practices in Cities and States—Time Required to Create Compelling Public Opinion Against Such Methods

By E. W. Camp
Member of the Los Angeles Bar

"Our Government is the potent, the omnipresent teacher. For good or for ill it teaches the whole people by its example. Crime is contagious. If the Government becomes a law breaker, it breeds contempt for law. It invites every man to become a law unto himself. It invites anarchy."—Brandeis.

THIS document of 347 pages comprises a statement ten pages in length signed by the eleven commissioners, and two reports made to them and for them by Messrs. Zechariah Chafee, Jr., of Harvard, Walter H. Pollak, and Carl S. Stern, of New York.

The second of these reports deals with "Unfairness in Prosecutions" including abuses relating to time and place of trial, denial of counsel, or of other safeguards guaranteed by law to the accused during trial, and various forms of misconduct by prosecutors and judges in the court room. This report is therefore of especial interest to bench and bar since nearly all of the abuses consist of misconduct of lawyers or judges, or both.

The reporters say that these practices create resentment against law and government because committed by district attorneys and judges, the officials most definitely responsible for law observance, and occur in the publicity of the court room. The report is based on a study of reported cases, an examination of appeal briefs, a survey of books and essays, and information gathered incidentally during an investigation of the third degree. Reported cases are the chief source of material.

The district attorney sometimes unfairly delays bringing the case to trial. This involves acquiescence of the judge, to the discredit of the bench and bar. Or a defendant is forced to trial without reasonable time to prepare, sometimes in face of a statute. Here again the district attorney and judge co-operate to do an injustice. Twenty-four decisions reported in a five-year period show reversals for unfairness of this sort. In many of the cases the action of the district attorney and judge was atrocious.

Where attempt is made to disqualify the judge for bias or prejudice he often decides the question himself. The contrary is the practice in federal courts. The action of Judge Thayer in the Sacco-Vanzetti case in passing on the question of his own prejudice is cited as an unfortunate exercise of his rights. He might and should, the reporters think, have called in another judge. For it is important to avoid not only unfairness, but also the shadow thereof.

Defendants in many cases have not been advised of their right to have counsel. Counsel have frequently been refused time to prepare. The report mentions refusal or failure to issue or serve process for defendant's witnesses, mistreatment of his witnesses, failure to furnish defendant a list of the State's witnesses.

One of the most common, pernicious, and least excusable sorts of unfairness is the use or attempt to use inadmissible evidence. Of course the district attorney may do this in ignorance of the law, but where he does it, as constantly occurs, knowingly and wilfully, it is one of the worst abuses, and the judges share the blame. The report cites many cases of this sort. It is evident that district attorneys the country over fall far behind the standard set by canon 5 of the American Bar Association. They attempt to use impeaching testimony as substantive evidence, include in opening statements charges which they do not expect to prove and would not be permitted to prove, slip in inferences to defendant's misdeeds not related to the offence, knowingly offer incompetent, prejudicial evidence, argue off the record. Especially do district attorneys try to prejudice the defendant by raking up misdeeds unrelated to the charge on trial. Numerous recently reported cases illustrate these faults.

Unfair and inflammatory comment on the evidence or on some act by defendant's counsel, slurring remarks by the district attorney are not infrequent, nor attacks on defendant's counsel for taking his case, nor unfair remarks about defendant's witnesses, nor improper reference to earlier proceedings such as a former trial of the case. And where the rule against reference to defendant's failure to take the stand is in effect, disregard of the rule is highly improper, yet often occurs. It is wrong for the district attorney vehemently to assert his own belief in defendant's guilt, yet how constantly that is done. Juries are urged to convict because the populace demands conviction. Appeals are made to racial or religious prejudice.

In short, the reporters find 246 cases published in this country in the five years ending with 1929 in most of which the district attorney grossly misused the power of his office. Instances of partiality and prejudice on the part of the judges are much

less frequent, yet not wanting. In some states justices of the peace or others holding similar courts are paid in whole or in part from fines and costs collected by them. Such an arrangement is vigorously condemned in the report and few will dissent. Nor should the district attorney's compensation depend in any degree on convictions.

Reviewing this report the members of the Commission say that the cases which come before the appellate courts show probably a very small proportion of the instances of abuse of official power.

Certain recommendations are made by the reporters—(1) establishment by law of a minimum time for preparation of the defense; (2) adoption by the state of the federal rule disqualifying a judge from passing on an affidavit alleging facts sufficient on their face to show his bias; (3) that the state seasonably furnish the accused a list of its witnesses; (4) representation of the accused by counsel except in petty cases or where the accused refuses counsel; (5) inclusion of negroes on jury lists; (6) clarification of the law relatng to admissibility of evidence of other offences; (7) allowance of comment on failure of the accused to testify; (8) abolition of payment of court officials from fines or costs; (9) gives the trial judge right to comment on the weight of the evidence; (10) gives appellate courts the right to reduce sentence without new trial; (11) give appellate courts power to grant new trials if required by justice whether or not proper exception was taken in the trial court.

The commissioners say, "The reporters recommend for consideration a number of specific remedies. Without adopting all of these, in our opinion they all call for careful consideration. Other bodies alive to the same evils have made recommendations involving modifications of the law of criminal procedure in state and nation. As we have elsewhere remarked, there has been no thoroughgoing revision of criminal procedure in the United States since the foundation of our constitutional government. It is high time that there should be in every state as well as in Congress a careful study of the subject and the adoption of some thoroughgoing reconsideration of the laws affecting prosecutions for crime."

The new laws recommended in the first, second, third, and fourth suggestions would be wholly unnecessary if district attorneys and judges were alive to their duties and reminded of them now and then by an alert bar. Possibly the reporters do not appreciate the aversion in many states to mixed panels of whites and negroes. We may expect the sixth, tenth and eleventh recommendations to be considered by the reporters for the Code of Criminal Procedure in their work for the American Law Institute. The American Bar Association is on record in favor of the seventh recommendation. The eighth will be generally approved. The ninth is already the rule in federal courts and in a few states. Whether other states can be persuaded to adopt it is a question. It is also a question whether in some states the judges could be expected to perform so delicate a duty well.

The reporters make no suggestion that bar associations and judicial councils might correct without change in the laws most of the abuses denounced in the report. Perhaps they wished to avoid flattery, for when has ever a district attorney been brought to book by his bar association for even the grossest unfairness toward the accused? What have bar associations done to obtain such rulings of court or orders as would secure the accused against these violations of his rights?

A report on the third degree makes up nearly two-thirds of the volume; but this includes certain unlawful practices which are often used as preliminaries and aids to the third degree proper, such as illegal arrests, refusal of bail, holding incommunicado, holding in vile quarters, beating when not administered in connection with interrogation.

The reporters used, as others have, the cases that have found their way into the state and federal reports, some 80 books and magazine articles, many newspaper items; they sent an elaborate questionnaire to officials, public defenders, bar associations, state and local. (From the bar associations they received next to nothing.) They instituted for the first time a first hand investigation of conditions in fifteen cities and had a study made of many briefs in cases on appeal. The report collates and summarizes all this material clearly and convincingly; so that we have here the result of the first worthwhile effort to investigate and state the facts.

The investigation was directed toward present and recent conditions. Cases officially reported since 1920 were used. Other information was used only as it dealt with facts of the last five years.

From 1920 to 1930, in 67 cases the appellate courts found it to have been proved that confessions had been extorted by the third degree. These cases are found in reports of 26 states, the fifth and ninth United States Circuits, and the District of Columbia. In 39 other cases within the same period, some of them from six other states and the Eighth Circuit, there was some but doubtful evidence of use of the third degree. In all, 106 cases from 31 states and 4 federal courts; every section of the country except New England being represented. In England there has been no reported case of the third degree the last 20 years. For obvious reasons the reported cases include but a minute fraction of the instances of the use of the third degree.

After briefly stating the facts in many of the published cases, the report sets forth the situation in each of the 15 cities in which an investigation was made. The material for New York City is ampler than for any other, consisting of several reported cases, a report made in 1928 by the Association of the Bar of the City of New York, articles by Villard and Murphy, books by Lavine, Willemse, Donavan, and Fiaschetti, many newspaper items, and a notable record kept by the Voluntary Public Defenders Committee of a large number of cases. This is the only record of the sort found in the country. It shows that in about 20 per cent of the cases brutality was charged, and the attorney in charge of the work of the defenders is convinced of the general truthfulness of these statements. Of the persons shown by these records to have been beaten or otherwise maltreated, less than half had criminal records. Of those beaten more than 13 per cent were either dismissed or acquitted. More than half the beatings were administered at the

station houses, more than one-fourth at the time and place of arrest.

The report declares that the third degree is widely and brutally employed in New York City. Former prosecuting attorneys have stated this in print and in conversations with the investigators. One of them in a letter said in 1929 that the third degree had now become and was a recognized practice in the police department in the city of New York. Every police station in the city is equipped with the instruments incident to that process. The reporters say a milder method is to exhaust the prisoner by keeping him awake, or constantly wakening him after brief sleep. Or a man may be exhausted by long relays of questioning.

As to Buffalo there seems little doubt of the existence of the third degree by beating and clubbing. Another method there is by illegal detention before arraignment. The use of the third degree in that city is not due to lack of discipline in the police force.

In Boston the third degree is rarely used. There is no policy of violence. Department tradition is against it. Judges and police commissioners are appointed by the Governor. The press is alert. The prisoner is promptly taken into court and removed from the custody of the police.

In Newark, New Jersey, the uniformed police do not attempt to get confessions. The detectives at headquarters sometimes use violence, but only after long questioning has failed to get the desired result. Holding incommunicado is practiced and is considered by the police to be necessary. Severe brutality is rare. The right given in New Jersey to comment on defendant's failure to take the stand has not lessened the use of the third degree methods.

In Philadelphia there was a good deal of third degree practice up to two years ago when orders were given to cease brutality. But prolonged detention, called cold storage, is in vogue. Some prisoners in cold storage are said to be held incommunicado. The police department thinks this cold storage necessary in order to get confessions.

In Cincinnati men are held for days for investigation. The policy of the police department the last three years has been against the use of the third degree. A voluntary defender, selected by th Legal Aid Society, has free access to the cells.

In Cleveland the third degree prevails, prolonged relay questioning is used with loss of sleep, deprivation of food and drink. If the prisoner falls asleep he is wakened by slapping his face. Prisoners are beaten to get confessions. Conditions in that city are bad.

In Detroit no extreme cases have been noted. Suspects are sometimes slapped and hit and arms are twisted. In homicide cases taking of suspects to the morgue is common. Prisoners were taken around the loop, that is shifted from one station house to another, jammed into crowded cells, and not overfed. This was not chiefly to get confessions but to force them to agree to leave town. We may add that it is now insisted by the district attorney at Detroit that the trips around the loop were wholly discontinued two years ago.

There is no doubt that the third degree is thoroughly at home in Chicago. One of the best informed persons on Chicago practices tells the reporters that it was an exception when a suspect was not subjected to personal violence. Violence against suspects still exists although it is said to be diminishing. Violence is regarded as general and prevailing in cases outside the protected groups of suspects—groups, that is, protected by corruption and influence. Illegal detention and holding incommunicado are said to be common. The true date of arrest is often not entered on the police blotter. Illinois reports show that Chicago uses the third degree in most brutal form.

The reporters are in doubt whether the third degree is or is not used in Dallas, but arrests without due cause, detention without proper charges, and denial of access by counsel are prevailing practices. A cell at headquarters is known as the incommunicado cell.

In El Paso there is little third degree, some brutal questioning, some brutality toward narcotic addicts.

In Denver men are often held for days incommunicado, and the judges cooperate by giving considerable time to make returns to writs of habeas corpus. Apparently use of the third degree is exceptional.

The third degree exists in Los Angeles. In San Francisco men are brought into court promptly but third degree brutality is common. Beatings are given in the street, in the patrol wagon, in outlying stations, but most of them in the Hall of Justice where the police jail is located.

It is the usual practice to beat men in Seattle at time of arrest and in the patrol wagon and in the police stations while handcuffed. Prolonged detention incommunicado is frequent.

The reporters conclude that the third degree is widespread through the country. Physical brutality is extensively practiced, the methods ranging from beatings to harsher tortures. The most common method is questioning so protracted that the prisoner's energies are spent and his powers of resistance overcome. Threats are made and prolonged detention is common, holding incommunicado frequent. A man beaten at time of arrest is likely to be more amenable to police questioning.

In considerably more than half the states the third degree has been administered in the last ten years. In ten of the fifteen cities investigated there is no doubt of the existence of the third degree. The practice is not confined to cities. There is little of the third degree practiced by federal officers. "When all allowances are made it remains beyond doubt that the practice is shocking in its character and extent, violative of American traditions, and not to be tolerated."

The police say that the third degree is necessary. (This should be taken in connection with the fact that police generally deny the existence of the third degree.) The reporters and the Commission adopt the Lord Chancellor's answer, "It is not admissible to do a great right by doing a little wrong. It is not sufficient to do justice by obtaining a proper result by irregular and improper means."

It is not true that the third degree is used only on the guilty, even if it were there are conclusive reasons against its use.

The experience of England, of Boston (and it might be added of Canada and of other countries)

demonstrates that success in prosecution of crime is possible where the third degree is unknown.

Police brutality is sometimes said to be the inevitable reaction to the brutality of criminals, and this is supposed to justify beating up anyone suspected of crime, as in the instance of the innocent school teacher in the famous case in Chicago.

Abandonment of the third degree will improve, not impair, the morale of the police. And at any rate, the proposal to bestow upon subordinate officers a license to dispense with law is without foundation in our institutions. Nor does the experience of Chicago lead to the belief that the third degree practice wipes out gang crime.

To defend the third degree is to advocate lawlessness by those charged with the enforcement of law and the district attorneys who wink at the third degree joins the police in flouting the constitution and statutes which he is sworn to maintain. The third degree involves danger of false confessions. This is historically the main basis for the rule excluding evidence of forced confession. There have been many instances of forced confessions which were false and subsequently demonstrated to be false. The third degree impairs police efficiency, impairs the efficient administration of criminal law in court, and brutalizes the police. It may be added that by reason of the third degree and other police brutality the people become accustomed to violence.

The real remedy lies in the will of the community, not in more laws of which we have now plenty. The reporters recommend that facts as to detention and treatment should be made matter of public record. Records should be kept of the time of arrest and detention, of the places of detention, interviews of police and prosecutors with prisoners, time when the interviews begin and end, record of visible injuries to prisoners. The press can do much by constant publicity. In every locality, the reporters say, there should be some disinterested agent, bar association, public or voluntary defender, or civic body to which a citizen, especially one who is poor and uninfluential, may report abuses with the knowledge that he will be protected against retaliation and that his complaint will be searchingly investigated.

The reports refer at some length to the work of a committee of the Bar Association of Los Angeles, California, known as the Constitutional Rights Committee, which for the past three years has investigated such complaints, bringing the facts into the sunlight and lessening the use of the third degree in that city. The Defenders Committee in New York is always working and the Association of the Bar of the City of New York is awake. Will the state and local bar associations generally make effective resistance to the invasion of constitutional rights?

The Commissioners in submitting this report to the public say, "The practice of the third degree involves the violation of such fundamental rights as those of (1) personal liberty; (2) bail; (3) protection from personal assault and battery; (4) the presumption of innocence until conviction of guilt by due process of law; (5) the right to employ counsel." Probably, the commissioners conclude, the best remedy for this evil would be the enforcement of the rule that every person arrested charged with crime should be forthwith taken before a magistrate, advised of the charge against him, given the right to have counsel, and then interrogated by the magistrate His answers should be recorded and should be admissible in evidence against him in all subsequent proceedings. If he chooses not to answer, it should be permissible for counsel for the prosecution and for the defense as well as for the trial judge to comment on his refusal. The existing rule in many jurisdictions which forbids counsel or court to comment on the failure of the accused to testify in his own behalf should be abolished.

But pending the adoption of legislation or constitutional amendment necessary to this charge, this Commission has deemed it to be its duty "to lay the facts—the naked ugly facts—of the existing abuses before the public in the hope that the pressure of public condemnation may be so aroused that the conduct so violative of the fundamental principles of constitutional liberty as that above described may be entirely abandoned." It would seem that the change suggested should go further and provide that the accused shall be notified by the magistrate that if he declines to answer relevant questions propounded by the magistrate he will not be permitted to testify at his trial and will not be allowed to call witnesses.

By no means all the "naked and ugly facts" of lawlessness in the enforcement of law are considered in this report. For instance, the kindly custom of swapping undesirables is barely touched on in suggesting that at Detroit men are passed from one police station to another until they agree to leave town. The enforcement of law by persuading suspects to move on is much used, but there has been no investigation to disclose the extent and results of the practice. According to Captain Willemse (Behind the Green Lights) the police of New York City beat up thousands of men not to obtain confessions but by way of punishment, often without arresting them. That city has no monopoly of this way of enforcing law by lawlessness, but the subject has received no investigation. Housebreaking by the police has usually no connection with the third degree. In short, much that is not touched on in the document is included within its title. The reporters say that the scope of their work was limited to fit the funds and the time at the Commission's disposal. Within the chosen field, however, the report will be the standard book of reference and should have a lasting effectiveness. The immediate possibly ephemeral reaction is an investigation of brutality in the District of Columbia, an investigation of police abuses in San Francisco, a grand jury investigation in Los Angeles of a number of charges of assaults by the police and other abuses, following a vigorous denial by the chief of police that the third degree was known in the city.

To create a sound and compelling public opinion against the third degree will require much time, much effort, and much patience. One of the investigators for the Commission has made a further valuable contribution to the subject in an article in the September, 1931, Atlantic, entitled "The Lawless Arm of the Law," and is said to be nearing publication of a book to be entitled "Our Lawless Police."

REPORT ON CRIME AND THE FOREIGN BORN*

It Performs Real Service in Once More Endeavoring to Explode Myth of Greater Criminality of Foreign Born—Underlying Data Is Monumental Piece of Work, but Commission's Observations Are Neither Stimulating Nor Provocative—No Direction Posts for Solution of Fundamental Problems

By Morris L. Ernst
Member of the New York Bar

WHENEVER a document deals with crime it is essential to bear in mind that crime is a matter of fashion and style. Crimes change like women's hats, and also in accordance with longitude and latitude. Thousands of men and women are in jail today who, if they had been born a few decades sooner, would have lived out their lives in open freedom. Our Liquor Laws are one instance. A Pure Food Act or a Lottery Law brings into the category of "criminal" thousands of theretofore respectable citizens. Eavesdropping in a public place is not considered anti-social in every state of the Union. Many acts which were called criminal in one decade becomes sanctioned in another.

And may it be noted that nullification is also a process of our national life. In fact, the only defense of free men against the stupidity of the lawmakers and judges is a disregard of the law. Nullification is not the result of any action of the people, but flows from the law-givers turning out a product inconsistent with the desires and modes of the community. Not all anti-social acts are crimes, and many crimes are not termed anti-social by wide groups in the community.

All of this seems important in any consideration of the attitude of the Foreign Born toward this Thing called Crime. Moreover, we must be mindful of the fact that much happiness has come to the so-called old-time Americans from their faith that "them foreigners are the bad boys." Every time the native sons could picture a high crime rate for foreigners, it made them feel so much purer. The citizenship of native Americans was enhanced by knocking down the foreigners. And naturally, this motif was not unknown to the police and the judiciary. No better manifestation thereof has been broadcast to the entire world than Judge Thayer's charge in the Sacco-Vanzetti case.

We have been brought up to believe that we have been speaking the truth when we pointed with horror to the foreigners as the criminals of the land. This report of the Wickersham Commission performs a real service in endeavoring once more to explode this myth. The Commission itself says that

"in proportion to their respective numbers the foreign born commit considerably fewer crimes than the native born; that the foreign born approach the record of the native born most closely in the commission of crimes involving personal violence, and that in crimes for gain the native born greatly exceed the foreign born."

This statement is the Commission's only observation of value. In spite of the calm conclusiveness of this statement there is slight hope that it will seep into the consciousness of the Nation. The work of the Commission in this field will be almost valueless. And the reason why this report will have slight efficacy, in my opinion, arises out of the mood of approach of the Commission itself. The underlying data prepared by Dr. Edith Abbott, with supplemental reports by Miss Alida C. Bowler; Dr. Jacob Horak; Dr. Paul S. Taylor; Dr. Max S. Handman; Mr. Paul Livingstone Warnshuis and Prof. Jesse F. Steiner, comprise a valuable and monumental piece of work. The discussion of public opinion in the Colonial days to the present, the statistics in regard to crime of foreign born in cities having high or low percentages of foreign born, the data in regard to convictions obtained, police arrests, violations under the Prohibition Laws, commitments of petty offenders indicate studious and workmanlike compilations of the data available. The difficulties encountered in the administration of criminal justice by the foreign born, the inadequacy of our interpreter system, observations in regard to public defenders, are succinctly stated. If the Commission itself had only used all this data as a springboard for some thinking of its own! Congress would do well next time to retain Dr. Abbott and her crew without the retarding effects of a window-dressing commission. A high school debating society could issue a more stimulating and provocative report on the Abbott findings.

Special studies in regard to Mexican immigration and the community studies of New Orleans, San Francisco and Stockton, California, are interesting reading for any one concerned with our process of jurisprudence. But by and large, it seems to me that the Wickersham Commission was content to make a survey and showed no inclination which would suggest new paths or striking reforms.

Salvation does not lie alone through the competent gathering of data. For my part, I would have preferred to have less adequate data but at least some kind of a gesture of a plan for even those evils which the Commission deemed important in social effect. Possibly the Commission purposely ducked this entire problem because of the very natural difficulties that arise from the fact that "foreign crime," so-called, is not in the public mind limited only to the immigrant himself. The general public opinion seems to be that the second generation of immigrants are the naughty boys, and

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obviously our crime statistics, being weak at best, would probably provide no foundation for any observations as to second generation cases. But from the masterful assembly of research made for the Commission we find nothing which gives us any direction post on any phase of the many problems indicated.

What should we do about the *Fact* that the foreign born are more freely subjected to Third Degree tactics? What if Mexicans show high rates of criminality? Has this any relation to the fact that our Mexican population is predominantly male? Should our immigration laws also have sexual quotas? To what extent has the organization on national lines of political groups prevented in other communities an amalgam such as exists in New Orleans? What, if any steps, can be taken in respect to the lottery and gambling proclivities of Chinese in San Francisco, where the ratio rises as high as 82 percent?

Fundamental to the entire problem, it seems to me, is the attitude of police toward foreigners. If it is a fact that the police are less inclined to arrest anyone who speaks proper English and has an Americanized suit of clothes,—indications of official political influences—what steps should be taken to prevent this inordinate proportion of arrests of foreign born?

Surely the Commission had an opportunity to consider the general question of the piling up of new offenses in our criminal statutes. In Mexico City I have seen peons carry bags of silver coin running into thousands of dollars, on their backs without a police guard in sight. In several of the large cities of the United States banks do not send gold around the corner of a city street unless an armored truck acts as conveyor.

This report of the Commission is nearly a calamity. It will set us back a decade or two in our deliberation of the underlying social problems. It will be nearly impossible to gain a reconsideration of the issues involved. In true American fashion, the question of "Crime and The Foreign Born" is a dead horse. Mr. Wickersham's Commission handled that matter for us! We have a report. The problem is out of the way!

As a people we might have accommodated to a plan if the Commission had been adventurous with life, critical of the staff data and something less than politically lethargic.

DEPARTMENT OF CURRENT LEGISLATION

Divorce and the Legislatures

BY J. P. CHAMBERLAIN

THE divorce laws passed at the last legislatures indicate a general tendency toward liberality. There is no case in which a legislature has taken a step restricting either cause or procedure, and while not many new grounds have been admitted, there is some advance on this side. Certain states, however, like New York and South Carolina, still stand firmly against the policy of easy divorces and this must have had an effect in the increasing hospitality offered by certain states to discontented spouses who either are not able to procure a decree in their own domiciles or prefer the comparative secrecy of a distant tribunal. The natural reaction of the state of matrimonial domicile against this proceeding, especially when the divorced person returns promptly within its boundaries, and its refusal to give full effect to such divorces, has nevertheless been tempered by a realization of the consequences which would flow from a strict application of a rule holding such decrees void. Though free under the Constitution of the United States to treat these judgments as they will, the courts give evidence of a restraint arising from the injury to their own citizens which would arise from inflexibility. They show an inclination to waive the fraud on the state involved, and to pay particular attention to the fraud on the citizen who has been defendant. Where his interests require that the decree be enforced, there is no hesitation to give it effect. The legislatures appear inclined wisely to leave discretion in such cases in the hands of the courts.

The liberality of certain states in making it easy to acquire residence sufficient for giving jurisdiction to their courts to decree divorce, has been increased by Idaho, Chapter 77, Nevada, Chapter 97 and Arkansas, No. 71. Idaho and Arkansas reduced the period of residence to ninety days, Nevada to six weeks. The Governor of Idaho vetoed the bill but it was passed over his veto, thus showing the overwhelming opinion of the legislature. In Arkansas a petition for referendum was prepared but subsequently held invalid by the supreme court, so that the act went into effect. The large number of dissatisfied persons from other states who have taken advantage of the opportunity offered them by Nevada, at least, since the change in the law, will increase complications involved in such divorces in the home state, especially where jurisdiction over the defendant is acquired by publication, and there is no personal appearance. Even where the plaintiff was a bona fide citizen of the state from whose court the decree issued, the courts of the state of the domicile of the other party,

who did not appear, are not bound by the clause of the Constitution requiring that "full faith and credit should be given in each state to the public acts, records and judicial proceedings of every other state."[1] They may, therefore, give what effect they choose to such a decree. They will claim even more latitude where the plaintiff's residence appears to them to have been acquired in order to secure a divorce and therefore not to be bona fide.[2] Even where the defendant has appeared in such case, the courts of the state of the matrimonial domicile are not bound to recognize the decree, since the court of the foreign state never had jurisdiction to render the decree.[3]

The consequences, however, of refusal to recognize the divorce in the state of the matrimonial domicile may bear hard on citizens of that state, notably, in the event of the remarriage of the party who has secured the divorce, or of the remarriage of the defendant, so that the courts hold that the question as to whether the divorce shall be given effect or not is one of public policy; if justice requires, a divorce may be considered binding. This is particularly so where the defendant has either appeared in the action or has subsequently shown his acceptance of the situation created by the divorce. Where, for example, the matrimonial domicile was New York, the wife went to a foreign state to secure a divorce, the husband was served by publication and did not appear, the divorce was given effect. The husband had shown his acceptance of the decree by marrying another woman so, as the court said, "This, then, is not a case in which to apply our rule of public policy which was adopted for the protection of citizens of New York who refused to be bound by a foreign decree."[4]

The consideration that the defendant had not appeared and jurisdiction was acquired only by publication is given great importance in the cases.[5] The Nevada Legislature in Chapter 156, has given another opportunity to correct the default. Even after a court has lost jurisdiction to change a default decree through lapse of time the party in default may at any time thereafter "enter general appearance in said action and said general appearance so entered shall have the same force and effect as if entered at the proper time prior to the rendition of said judgment or decree." Such general appearance "shall be entered *nunc pro tunc* as of the date of the original judgment or decree." The statute is not limited to divorce cases but it will obviously keep the door open indefinitely for a formal acceptance of the decree by the party in default. In states in which the courts take a lenient view where both parties appear or accept the decree by acting under it, an appearance under this act may well be given the same effect as if the defendant has been represented at the trial.

The Nevada solons recognizing, perhaps, the criticism that their hospitality to dissatisfied wives and husbands is too easy, enforce a rule of evidence by Chapter 169, which requires corroborative proof of residence in all civil cases where the jurisdiction of the court depends on the residence of one of the parties. Where both appear the rule will not apply.

Another attitude toward jurisdiction is that of the Uniform Divorce Jurisdiction Act adopted in Vermont, No. 45. That Act bases jurisdiction on domicile and permits the court to entertain the cause only if the libellee is domiciled in the state or the libellant has a separate domicile therein "which by consent or owing to the conduct of the libellee is the rightful domicile of the libellant." There is no time limit of residence fixed in the Act except that where a separate domicile was acquired subsequent to the arising of the ground for the divorce it must have continued uninterruptedly for one year next preceding the beginning of the action. If a citizen of another state goes to Vermont and there secures a divorce and returns to his original domicile there may be a difference of opinion as between the court of Vermont and the court of the original domicile on the validity of the domicile in Vermont and, therefore, of the decree. This situation would not seem to be affected by the section of the Act which requires that full faith and credit be given to a decree if the jurisdiction of a court rendering it was based on provisions "not inconsistent with the provisions prescribed in the Act."

The idea is gaining ground that in certain situations in which the marital life is obviously at an end, a wise public policy will permit a divorce without any consideration of fault. In the Consolidated Statutes of North Carolina stood a provision that "marriages may be dissolved—on application of the party injured—5. If there has been a separation of husband and wife, and they have lived separate and apart for ten successive years, and the plaintiff in the suit for divorce has resided in this state for that period."[6] This period was shortened to five years in 1921, by Chapter 63. Interpreting the act the court held that the party who was at fault for the separation was not entitled to a divorce under the statute.[7]

In another case a husband endeavored to make use of the statute to get a divorce where his wife had been for five years in an insane asylum, but the court again said that "only the misconduct of the parties, and not their misfortunes, are made by our statute to justify the divorce." Only in case of separation "caused by desertion or abandonment or other wrongful act of the party sued" can the act apply.[8] The legislature in 1931 adopted a different policy and changed the law to take away the element of fault. The new law is not in form an amendment of the section of the Consolidated Statutes, but an independent enactment, so that the clause in the Consolidated Laws "on application of the party injured" no longer applies, and either party may have the divorce in case of a separation for five years, if there are no children, and if the plaintiff has resided in the state during the five-year period. [Chapter 72.] Evidently the legislature has adopted the point of view of an early case that "the public policy which finds expression in this statute rests on the assumption that it is not well for persons in these circumstances to be absolutely deprived of all right to marry again; and,

1. U. S. Constitution, Art. IV, §1. Haddock v. Haddock, 201 U. S. 562.
2. In re Dorsett's Est., 242 N.Y.S. 232; State v. Cooke, 110 Conn. 348; Walker v. Walker, 125 Md. 649. In re Bennett's Estate, 238 N.Y.S. 723.
3. Walker v. Walker, 125 Md. 649; Andrews v. Andrews, 188 U. S. 366.
4. In re Briggs Est., 245 N.Y.S. 600, 615.
5. In re Dorsett's Est., *supra*, note 2; In re Bennett's Est., *supra*, note 2; Fischer v. Fischer, 254 N.Y. 463.
6. Consolidated Statutes, Ch. 30, §5.
7. Sanderson v. Sanderson, 100 S. E. 590.
8. Lee v. Lee, 108 S. E. 352.

where it has been sufficiently demonstrated by a ten years' separation that a reconciliation will not occur and there are no living children to be affected, the lawmakers have deemed it expedient and right to establish this as a cause for absolute divorce."[9] The theory that divorce is a sort of penalty which the innocent may demand from the guilty party yields to the theory of divorce as a means of social adjustment without consideration of fault. The new statute applies if there has been a separation "either under a deed of separation or otherwise." Under this broad language the courts may again be called upon to face the question whether a separation caused by insanity would come within the terms of the act. The court has power to provide for the support of the insane wife, so that one objection urged against extending the old law to insanity is not in principle tenable, but there still remains the problem of her dower on her husband's death, or share in his estate in the event of her survival.

Arizona by Chapter 12 and Nevada by Chapter 111 apply the same principle to cases where the parties have given evidence that they are not suited to married life. Nevada permits the divorce at the suit of either party, if husband and wife have lived apart for five consecutive years without cohabitation; and Arizona allows the divorce "when for any reason the husband and wife have not lived or cohabited together as husband and wife for a period of five years or more." Webster defines "cohabitation" as "living together as husband and wife," so it would seem that the reference to cohabitation is a sin against that economy in the use of language which should inspire the legislative draftsman.

The same principle of social adjustment as against fault is applied by Vermont, No. 44, to insanity. A divorce may now be granted in the Green Mountain State where either spouse has been confined in an asylum of Vermont or a "sister state or territory" for at least five years next preceding the commencement of the action, and if the court believes that the insanity is incurable. If therefore, the insanse person is in an asylum in Canada or any other foreign land, the bond of matrimony is apparently maintained against attack. The court may make orders for the support of the insane spouse and division of property, and the rights of the insane party are protected by requiring the State's Attorney to defend the action, with the very vigorous sanction that no divorce shall be granted if this provision is not complied with. The public interest here is double; one, the interest in sustaining the marriage, the other the interest of the state or town in assuring the support of the insane person. In Hawaii divorce was formerly granted for the incurable insanity of either party, where the same has existed for three years or more. The legislature in amending the divorce law struck out the word "incurable," so that divorces may now be granted in Hawaii for "insanity" of either party, [Act 196,] a very appreciable increase in the freedom of the court in appreciating the fairness of a divorce. It is no longer compelled to be sure that the mental malady is incurable.

Nevada blends the principles of social adjustment with fault in an act, Chapter 110, permitting the court, where both parties have been guilty of wrongs which may constitute grounds for divorce, to nevertheless grant the divorce in its discretion to the party least in fault.

Hawaii, Act 196, sets forth a broad ground for divorce: "When either party is guilty toward the other of such cruel treatment, neglect or personal indignities, though not amounting to physical cruelty, continued over a course of not less than 60 days, as to render the life of the other burdensome and intolerable and their future living together insupportable." This is in addition to "extreme cruelty" which still remains a ground. The legislature uses strong words. Would a person have to be driven to the verge of suicide to prove that life was "intolerable"? The old criterion of a serious risk to the health of the complainant is clearly not to be the only standard. Obviously the legislature was depending largely on the discretion of the judges in applying the section, so as to accomplish social justice. North Carolina, Chapter 397, adds a new ground for divorce—the "abominable and detestable crime against nature with mankind or beast." The act is retroactive in effect.

The statute of Kentucky divides grounds for divorce into three classes: those which may be availed of by "both parties," those for which the wife may be freed from the bonds of matrimony, and those of which the husband may take advantage. The statute went on to say that no party can get a second divorce for any cause, except adultery or on a ground for which divorce may be granted to both husband and wife. In a recent case in that state a woman had divorced her husband for adultery and married again. She was disappointed a second time and applied for a divorce from the second husband for cruelty, but unfortunately cruelty does not happen to be one of the causes for which a divorce may be granted to either spouse. Only a wife may avail herself of this ground for divorce. Consequently the court was obliged to refuse the application.[10] The legislature at the last session, Chapter 66, amended the act by repealing the limitation on the number of divorces to which a person is entitled, so that the obstacle which the wife met in the case cited will not arise again in Kentucky.

After a long discussion in the courts, beginning in 1847, the legislature of Maryland has finally taken a hand in the debate on the effect of a deed or agreement of settlement between husband and wife. Under Chapter 220 any "deed or agreement made between husband and wife respecting support, maintenance, property rights or personal rights or any settlement made in lieu of support, maintenance, property rights or personal rights shall be valid, binding and enforceable to every intent and purpose, and such deed or agreement shall not be a bar to an action for divorce, either *a vinculo matrimonii* or *a mensa et thoro*, as the case may be, whether the cause for divorce existed at the time or arose prior or subsequent to the time of the execution of said deed or agreement, or whether at the time of making such deed or agreement the parties were living together or apart; provided, that whenever any such deed or agreement shall make provision for or in

9. Cook v. Cook, 80 S. E. 180.

10. Humphress v. Humphress, 230 Ky. 617; 20 S. W. (2nd) 436.

any manner affect the care, custody, education or maintenance of any infant child or children of the parties the court shall have the right to modify such deed or agreement in respect to such infants as to the court may seem proper, looking always to the best interests of such infants."

The validity of such agreements appears to have been sustained by the Maryland courts,[11] and the more so where there was no divorce,[12] even though a decree of divorce has issued subsequent to the making of the agreement. In one case the divorce was for adultery of which the husband was aware at the time he made the covenant. The court remarked that "we see no good reason why the divorce should discharge the husband from the obligation he has voluntarily assumed."[13] Under the terms of the statute it might be argued that the agreement could be maintained even in the event of divorce for adultery subsequent to the settlement or for an adultery of which the husband knew nothing at the time of making the agreement. The statute expressly says that "the agreement shall be valid even if the cause arose subsequent to the time of execution of the deed." This rule is followed in other jurisdictions. In a New York case enforcing such an agreement against the husband, though a divorce was subsequently granted for his adultery, the court said, "The suggestion that the subsequent violation of the marriage vow by the defendant may be treated as vitiating the separation agreement does not require extended consideration, for it is without potency."[14]

The final clause in the section in respect to the right of the court to modify the agreement to the best interest of the infant is the generally settled law,[15] and has been applied in Maryland.[16]

The law in Maryland may not be changed by the provision that such an agreement "shall not be a bar to an action for divorce, either *a vinculo matrimonii* or *a mensa et thoro*, as the case may be, whether the cause for divorce existed at the time or arose prior or subsequent to the time of execution of said deed or agreement, or whether at the time of making such deed or agreement, the parties were living together or apart,—" The law in Maryland appears to be that such a deed is evidence of an agreement of the two parties to live apart and therefore evidence of a condonation of any cause of action for desertion, or even for other grounds, but it is not *per se* a bar to a suit even for desertion. It may be explained by other circumstances which show that it was not intended as a condonation. In a recent case the court says: "This *prima facie* presumption of a common intent with respect to future separation [resulting from a deed of separation] has been held by this Court to be rebuttable by parole evidence of the surrounding circumstances, even where the contract contemplates the cessation of cohabitation." It adds that should the "articles of separation and the accompanying circumstances show" that there was an agreement to live apart by common consent, there is no statutory desertion.[17]

The conditions under which the agreement was made, such as the settlement of a suit for divorce, may show that it was not intended as a consent to a separation and therefore the non-consenting party may bring suit on the ground of desertion.[18] Even where the husband knew of his wife's adultery at the time of making the agreement and where a considerable period elapsed from the time of making the agreement to the bringing of the suit, the court permitted evidence to explain the delay and to show that condonation was not intended and gave the husband his decree.[19] There would seem to be no reason why the language of the statute should interfere with the introduction of the deed in an action for divorce for desertion or indeed on other grounds, to show condonation.

There are few changes in the procedure in divorce cases. Publicity of proceedings has been avoided in two different states — Nevada and Hawaii. The Hawaii Act, 247, permits a judge, where leprosy is the ground, if there be no contest, to grant a divorce without a hearing, "whenever it shall be made to appear by the certificate of the President of the Territorial Board of Health" that leprosy exists, and if the diseased person has resided in the Territory for not less than two years next preceding the filing of the libel. The requirement of a certificate of the President of the Board of Health is a protection against collusive action or against fraud. In a normal case such certificate is not required and it is only necessary to show "to the satisfaction" of a judge that one of the parties has contracted leprosy. In Nevada, Chapter 222, the legislature goes a long way in securing privacy in the proceedings. In any action for divorce the court shall "upon the demand of either party, direct that the trial and issue or issues of fact joined thereon, be private, and upon such direction all persons shall be excluded from the court or chambers wherein said action is tried, except the officers of the court, the parties and their witnesses and counsel." Furthermore, upon the written request of either party, all "papers, records, proceedings and evidence, including exhibits and transcript of the testimony shall . . . be sealed and shall not be open to inspection, except to the parties or their attorneys, or when required as evidence in another action or proceeding." This provision does not apply to the papers and pleadings which make up the judgment roll, which must be open to public inspection. The pleadings are simplified by permitting the complaint, cross-complaint or counter-claim to state the causes for the divorce "in the words of the statute." But either party may demand a bill of particulars, which, however, need not be filed and if filed may be withdrawn on the written consent of the parties. This statute goes far in protecting from unwanted publicity the suppliants for relief from the bonds of matrimony in the tribunals of the Sagebrush State.

11. Melson v. Melson, 151 Md. 196; *Barkley* v. *Barkley*, 98 Md. 366.
12. Brown v. Brown, 5 Gill 255.
13. Kremelberg v. Kremelberg, 52 Md. 553, 563.
14. Galusha v. Galusha, 116 N. Y. 635, 643.
15. Hayden v. Hayden, 215 Ky. 299.
16. Melson v. Melson, supra.
17. Melson v. Melson, supra, p. 203.
18. Lemmert v. Lemmert, 103 Md. 57.
19. Kremelberg v. Kremelberg, supra, 557; J. G. v. H. G., 33 Md. 401.

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"LEFT HAND JUSTICE"

A special phenomenon of the present-day administration of Justice seems to be strikingly described by the title of this editorial. It was used by Mr. Herbert R. O'Conor, State's Attorney of Baltimore, Md., in a recent address before the American Prison Congress, to describe the shifts and compromises and indirections which are frequently resorted to nowadays in order to secure at least some sort of punishment for those who are generally, and perhaps properly, understood to merit something much more severe because of their continued successful flaunting of the law. He says:

"Efforts should be frowned upon which have as their object the imprisonment of a man upon a minor and technical charge, when he is really known to be a major offender, and his conviction for his serious wrongdoings has not been attempted. We note with regret, that ofttimes a notorious criminal, characterized as a public enemy, is ushered into a penal institution after conviction on a formal, trivial charge whilst the general understanding is that evidence is at hand tending to show that he has been engaged steadily in defying the law in serious, major operations of crime. It is not denied that the reason behind the prosecution for the lesser offense is that the particular individual is a menace to society. If, then, that be true, he ought to be tried for the major crime or crimes for which he is responsible, rather than punished for them indirectly by improvised charges of vagrancy, income tax dodging, or the like. Too much left-hand justice is being applied."

Something of the same idea was doubtless in the mind of Attorney General Mitchell when in a recent address, published in the December issue of the Journal, he protested against the tendency of State authorities to leave the punishment of notorious local offenders of the "gang type" to the Federal Government, after a prosecution for one of the relatively few, and comparatively minor, offenses they may have committed in violation of a Federal Statute. "We have in many of our large cities," he said, "organized gangs of criminals who engage in every conceivable crime against the laws of God and man. Their offenses against the Federal Government are relatively few compared with those against State laws. Murder, extortion, kidnapping, banditry, blackmail, gambling rackets, levy of tribute on business by threats of violence, and frauds, unless committed in those limited areas in which the Federal Government has exclusive sovereignty, such as the District of Columbia, are not directly violations of any Federal law. There are as many different kinds of 'rackets,' worked by organized bands of criminals as there are varieties of pickles. Is the extermination of these criminal bands to be chiefly the task of the Federal government because they do not pay Federal income taxes on their illicit gains or because incidentally they violate some Federal Statute?"

But the situations above outlined do not exhaust the list of attempts to apply "left-hand" justice by law-enforcing agencies. Not long ago a civic body in Chicago published a list of "public enemies," with the object of focussing public light and official attention more fully on a selected list of men as to whose activities there seems to have been little question, although for some reason or other they appeared to have small difficulty in evading legal punishment. The police, at the same time, were understood to have adopted the "left-hand" method of "harrying them out of the land" as far as possible by frequent arrests for vagrancy and other methods of rendering the orderly and quiet transactions of illegal business more or less difficult. A number of these, it may be added, have been retired from business since then and incarcerated in Federal penitentiaries, as a result of Federal prosecutions—this further "left-hand" device having been successfully employed against them. The

plan of printing a list of "public enemies" seems to have been since employed in Kansas City, and perhaps elsewhere.

In so far as the two quotations above are a protest against any abdication of responsibility by the State prosecutors, and a demand that they do their best to enforce the laws they are chosen to enforce, they unquestionably embody a sound view. If the general understanding of the criminality of certain persons is supported by legal evidence at hand or obtainable by the proper authorities, it is certainly their business to go ahead and make every attempt to enforce the law and to secure conviction for all the serious offenses with which the offender may be charged. What the Federal government, for instance, may do in the case of violation of its own statute does not affect the duty of the State authorities—and least of all is a conviction in a Federal Court for any offense to be taken as representing, even indirectly, a punishment for the crimes which the defendant may have committed against the State. Attorney General Mitchell and Mr. O'Conor have done well in emphasizing the perfectly clear duty of these law-enforcing agencies to discharge their own functions.

On the other hand, there is certainly no reason why the Federal government should not proceed whole-heartedly to enforce its own statutes against these law-breakers without regard to the fact that they have possibly committed vastly more serious offenses against State laws. The fact that the local prosecutors in some instances show a tendency to leave the whole thing to the Federal Government cannot affect the latter's duty to see that its own statutes are respected. If in the enforcement of its own laws it happens to convict and imprison some one who is vastly more criminal in another field, and who seems immune from conviction for some reason, that is a fortunate and helpful coincidence. Even assuming that the local prosecuting authorities were proceeding with full efficiency against the accused, the Federal Government could insist very properly on satisfaction for violation of its own statutes.

Unfortunately the difficulty of the problem does not lie in any lack of clearness as to the functions of prosecuting authorities. It lies in the fact that the administration of Justice locally is confronted with a sinister development of our own days—the organized criminal gang, with a vast machinery for law violation and evasion of punishment. That this machinery too often includes an alliance with "crooked politics" is too well known to require comment. It will be noticed that all the suggested applications of "left-hand" justice refer to gangsters. The extent to which the honest local prosecutor can make real headway against offenders of this sort will depend on many factors—and not least of all on the prevailing type of local politics. In the meantime "left-hand" justice will doubtless continue to be applied to a certain extent, with public approval, as a phenomenon and makeshift of a transitional period in criminal law administration — a period during which the law and public opinion, which must give vitality to the law, are adjusting themselves to an understanding of changed conditions and the right method of meeting them.

JUDICIAL SALARIES

In one or two States — as shown by press clippings which have come to the Journal — the suggestion has been made that judicial salaries be reduced as a measure of economy. This of course was to be expected from a certain type of citizen and legislator, who never can be brought to realize the essential economy — from the standpoint of results to be achieved in the administration of justice—of a fairly compensated judiciary.

As a matter of fact, salaries of judges in certain States, which have allowed judicial salaries to remain about where they were perhaps a generation ago, should be increased in spite of the prevailing depression or, if that seems impractical, at the very earliest possible moment. Where long-delayed and richly deserved increases have been granted in recent years, the salaries should be left undisturbed. They certainly do not represent, in any case which has come to attention in the reports of the Association's Committee or committees of State Bar Associations, more than a fair compensation under even the most unfavorable general conditions.

Bar Associations which are attempting, through committees and otherwise, to secure proper compensation for the judiciary should not falter in the good work. The education of public and legislative opinion should be carried on.

REVIEW OF RECENT SUPREME COURT DECISIONS

Citizenship of Administrator Rather Than of Beneficiaries in Suit to Recover for Death by Wrongful Act Held, Under Certain Circumstances, Controlling as to Federal Jurisdiction—In Prosecution for Violation of Federal Law Defendant Cannot Claim Immunity from Testifying on Ground Answer Would Expose Him to State Prosecution—Federal Employers Liability Act and Assumption of Risk—Jurisdiction of Interstate Commerce Commission to Prescribe Intrastate Rates—Minnesota Arbitration Provision of Standard Fire Insurance Policy Upheld—Oil and Gas Conservation Act of California, Etc.

By Edgar Bronson Tolman*

Administrators—Action for Death by Wrongful Act—Diversity of Citizenship—Real Party in Interest

Where an administrator is required to bring suit under a statute conferring the right to recover for death by wrongful act and is charged with the responsibility for the conduct or settlement of the suit and distribution of the proceeds, and is liable on his bond for failure to act with diligence and fidelity, he is the real party in interest, and his citizenship rather than that of the beneficiaries is controlling as to federal jurisdiction.

The fact that the motive for having a non-resident appointed administrator is to deprive the federal courts of jurisdiction to try the action, one of the defendant corporations being a resident of the same state in which the administrator resides, will not vest the federal court with jurisdiction where it would not have jurisdiction if such motive were absent.

Mecom v. Fitsimmons Drilling Co., Inc., et al., Adv. Op. 58; Sup. Ct. Rep. Vol. 52, p. 84.

This action was brought in a state court in Oklahoma to recover damages for the wrongful death of one Smith, resulting, as it is alleged, from the negligence of the respondents. One of the respondents is a Louisiana corporation.

After its institution the suit was removed to a federal district court which overruled a motion to remand the case. The petitioner, who instituted the suit, was a resident of Louisiana and sued as administrator appointed by a probate court in Oklahoma.

Prior to the institution of this suit the decedent's widow had been appointed administratrix. She had instituted three suits in the state courts which had been removed to the federal court. Motions to remand these were overruled and the suits were dismissed. Thereafter the widow resigned as administratrix and the petitioner was appointed. The purpose in having the petitioner appointed was to prevent removal of the case to the federal court, since he was a resident of Louisiana, where one of the defendants was incorporated.

On certiorari the Supreme Court reversed a judgment of the Circuit Court of Appeals sustaining the district court's refusal to remand the case to the state court. The opinion, delivered by Mr. Justice Roberts, reviews the law generally, and points out that where an administrator is required to bring suit under a statute conferring the right to recover for death by wrongful act and is charged with the responsibility for the conduct or settlement of the suit and distribution of the proceeds, and is liable on his bond for failure to act with diligence and fidelity, he is the real party in interest, and his citizenship rather than that of the beneficiaries is controlling as to federal jurisdiction.

In conclusion, full consideration was given to the respondents' contention that facts in the record disclosed a conspiracy to defeat federal jurisdiction which the court should thwart. Rejecting this contention, Mr. Justice Roberts said:

> But it is clear that the motive or purpose that actuated any or all of these parties in procuring a lawful and valid appointment is immaterial upon the question of identity or diversity of citizenship. To go behind the decree of the probate court would be collaterally to attack it not for lack of jurisdiction of the subject-matter or absence of jurisdictional facts, but to inquire into purposes and motives of the parties before that court when, confessedly, they practiced no fraud upon it. The case falls clearly within the authorities announcing the principle that in a removal proceeding the motive of a plaintiff in joining defendants is immaterial, provided there is in good faith a cause of action against those joined. While those cases involve a somewhat different situation,—that where a plaintiff joins defendants in order to avoid federal jurisdiction,—they are in principle applicable to the present case, where it is claimed a plaintiff was procured for the same purpose. It has been uniformly held that where there is a *prima facie* joint liability, averment and proof that resident and non-resident tort feasors are jointly sued for the purpose of preventing removal does not amount to an allegation that the joinder was fraudulent, and will not justify a removal from the state court. . .
>
> The case comes to no more than this: There being, under Oklahoma law, a right to have a non-resident appointed administrator, the parties in interest lawfully applied to an Oklahoma court, and petitioner was appointed administrator, with the result that the cause of action for the wrongful death of the decedent vested in him. His citizenship being the same as that of one of the defendants, there was no right of removal to the federal court; and it is immaterial that the motive for obtaining his appointment and qualification was that he might thus be clothed with a right to institute an action which could not be so removed on the ground of diversity of citizenship.
>
> We are of opinion that the petitioner's motion to remand the cause to the state court should have been granted. The judgment must be reversed and the cause remanded to the United States District Court with direc-

*Assisted by James L. Homire.

tions to set aside the judgment and remand the case to the state court.

The case was argued by Mr. Roy F. Ford for the petitioner, and by Messrs. T. Austin Gavin and George F. Short for the respondents.

Criminal Law—Self Incrimination

In a criminal prosecution for an offense against federal law, defendant has no immunity from testifying against himself on the ground that his answer to the question propounded would have rendered him liable to prosecution under a state law.

The United States of America v. Murdock, Adv. Op. 83; Sup. Ct. Rep. Vol. 52, p. 63.

The appellee in this case was indicted for refusal to disclose the recipients of $12,000 which he claimed to have paid others and deducted in his federal income tax returns for the years 1927 and 1928. A special plea was interposed setting up that the defendant ought not to have been prosecuted, because, if he had answered the question put to him, he would have given information that would have compelled him to become a witness against himself, contrary to the Fifth Amendment, and would have subjected him to prosecution of various laws of the United States. The government demurred to the plea upon the ground that it failed to show that the information sought would have incriminated the defendant or would have subjected him to prosecution under federal law, and that the privilege under the Fifth Amendment had been waived. The District Court overruled the government's plea and discharged the defendant.

On appeal this was reversed by the Supreme Court in an opinion by MR. JUSTICE BUTLER. The ground for reversal was that the plea was insufficient, since it rested not on a claim that the disclosure of the information would incriminate the defendant under federal law, but only under state law. In explanation of this MR. JUSTICE BUTLER said:

> Immediately in advance of the examination, appellee's counsel discussed with counsel for the Internal Revenue Bureau the matter of appellee's privilege against self-incrimination and stated that he had particularly in mind incrimination under state law. And at the hearing appellee repeatedly stated that in answering: "I might incriminate or degrade myself," he had in mind "the violation of a state law and not the violation of a federal law." The transcript included in the plea plainly shows that appellee did not rest his refusal upon apprehension of, or a claim for protection against, federal prosecution. The validity of his justification depends, not upon claims that would have been warranted by the facts shown, but upon the claim that actually was made. The privilege of silence is solely for the benefit of the witness and is deemed waived unless invoked. . .
>
> The plea does not rest upon any claim that the inquiries were being made to discover evidence of crime against state law. Nothing of state concern was involved. The investigation was under federal law in respect of federal matters. The information sought was appropriate to enable the Bureau to ascertain whether appellee had in fact made deductible payments in each year as stated in his return, and also to determine the tax liability of the recipients. Investigations for federal purposes may not be prevented by matters depending upon state law. Constitution, Art. VI, §2. The English rule of evidence against compulsory self-incrimination, on which historically that contained in the Fifth Amendment rests, does not protect witnesses against disclosing offenses in violation of the laws of another country. . . This court has held that immunity against state prosecution is not essential to the validity of federal statutes declaring that a witness shall not be excused from giving evidence on the ground that it will incriminate him, and also that the lack of state power to give witnesses protection against federal prosecution does not defeat a state immunity statute. The principle established is that full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination. . . As appellee at the hearing did not invoke protection against federal prosecution, his plea is without merit and the government's demurrer should have been sustained.

The opinion was concluded with a comment criticising the granting of leave to file the plea, since the defense could have been presented and disposed of under the general issue, and the piecemeal consideration of the case indulged in here resulted in unnecessary delay.

The case was argued by Mr. Solicitor General Thacher for the government and by Messrs. Edmund Burke and Harold J. Bandy for the appellee.

Federal Employers' Liability Act—Effect of Assumption of Risk

Under the Federal Employers' Liability Act no recovery of damages can be had by an employee for an injury sustained as the result of a risk known to and assumed by the employee. An employee who knows that chips will fly from a rail in process of being cut with a cold chisel, and who engages in cutting the rail without protecting himself by wearing goggles, assumes the risk of a chip flying into his eye, and cannot recover therefor when such an injury results.

Chesapeake & Ohio Railway Co. v. Kuhn, Adv. Op. 118; Sup. Ct. Rep. Vol. 51, p. 45.

In this opinion, by MR. JUSTICE MCREYNOLDS, the Court disposed of a suit arising under the Federal Employers' Liability Act, and ruled that on the facts shown the trial court should have directed a verdict for the defendant railway company.

The basis for so ruling was that the injury for which damages were sought resulted from a risk which the employee had assumed.

It appeared that the employee, Kuhn, was an experienced section hand, employed at the time of the accident in repairing a side track. In the course of the track work two rails were to be cut with a cold chisel. Kuhn was assisting in this work without goggles, although on other occasions goggles were used and Kuhn knew that chips would fly from the steel rails when being cut by the method pursued. The job was "a hurry-up one," and the foreman in charge had told the men "to gang up and go in a hurry, that he wanted to get through there," and said to them "Don't be afraid."

While engaged in cutting the second rail a chip flew into Kuhn's eye and destroyed it. On the facts shown the Court held that this injury resulted from a risk known to and assumed by the employee.

> We think the evidence clearly discloses that Kuhn's injury resulted from the ordinary hazards of his employment, which he fully understood, and voluntarily assumed. There was no complaint, no promise by his superior to mitigate the obvious dangers. The trial judge should have directed a verdict for the Railway Company.
>
> In cases like this, where damages are claimed under the Federal Employers' Liability Act, defense of the assumption of the risk is permissible and where the undisputed evidence clearly shows such assumption the trial judge should direct a verdict for the defendant. Moreover, in proceedings under that Act, wherever brought, the rights and obligations of the parties depend upon it and applicable principles of common law as interpreted and applied in the Federal courts. . .
>
> The court of appeals acted upon the erroneous theory that it should follow the views of the Supreme Court of the State rather than those of this Court in respect of questions arising under the Liability Act. That statute, as interpreted by this Court, is the supreme law to be applied by

all courts, Federal and State. . . Where this view is not accepted, as in the present cause, it is within the power of this Court to determine and apply the proper remedy.

The case was argued by Mr. Henry Bannon for the petitioner, and by Mr. Homer H. Marshman for the respondent.

Interstate Commerce Commission—Jurisdiction to Prescribe Intrastate Rates

In the performance of its function to prescribe just and reasonable rates for the transportation of property in interstate commerce, the Interstate Commerce Commission has power to prescribe intrastate rates for the transportation of such property in order to prevent unjust discrimination against interstate commerce, resulting from the application of intrastate rates fixed by state authority.

The inclusion of an allowance, in the rates prescribed, for ferrying to and from points on the Mississippi does not violate Article I, Section 9, clause 6 of the Constitution forbidding the giving of preferences to ports of one state over ports of another, even though such allowance may result incidentally in disadvantage to certain ports in the same or neighboring states.

Louisiana Public Service Commission v. Texas and New Orleans Railroad Company, et al., Adv. Op. 76; Sup. Ct. Rep. Vol. 52, p. 74.

This opinion dealt with a direct appeal from a decree of a District Court, specially constituted, sustaining an order of the Interstate Commerce Commission prescribing rates for the transportation of certain kinds of building materials. The rates were made applicable to both intrastate and interstate transportation. The building materials, subject to the rates, are transported in Arkansas, Oklahoma, Texas and that part of Louisiana west of the Mississippi, including certain points on the east bank of the river. The rates were based on straight mileage, and included a charge of eight cents a ton for ferrying such of the traffic as moves to and from named points on the east bank.

The Commissions of Arkansas, Oklahoma and Texas adopted the rates as prescribed. The Louisiana Commission adopted them in part, but refused to adopt them on traffic wholly within territory south of the Vicksburg, Shreveport & Pacific Railroad, or on traffic between that territory and the specified places on the east bank of the river.

The Supreme Court, in an opinion by MR. JUSTICE BUTLER, sustained the ruling of the District Court upholding the order of the Interstate Commerce Commission prescribing the rates. The opinion was devoted to two contentions advanced by the Louisiana Public Service Commission. The first contention was that the allowance for ferrying gives preference to certain ports in Texas over certain ports in Louisiana, contrary to Article 1, §9, cl. 6, of the Constitution forbidding preference by any regulation of commerce or revenue to the ports of one state over those of another.

This contention was rejected, and the proper interpretation of that clause of the Constitution explained as follows:

> The power of Congress to regulate interstate and foreign commerce is exclusive and has no limitations other than such as arise from the Constitution itself. . . The Congress may adopt measures effectually to prevent every unreasonable, undue or unjust obstruction to, burden upon or discrimination against interstate commerce whether it results from state regulation or the voluntary acts of carriers. . . And it has empowered the Interstate Commerce Commission to prescribe intrastate rates in place of those found unduly to discriminate against persons or localities in interstate commerce or against that commerce, §13 (3) (4) and to require the carriers to make and apply on intrastate transportation such reasonable charges as will produce its fair share of the amounts needed to pay operating expenses, provide an adequate railway system and yield a reasonable rate of return on the value of the property used in the transportation service. . .
>
> The clause of the Constitution invoked is: "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another; Nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another." The specified limitations on the power of Congress were set to prevent preference as between States in respect of their ports or the entry and clearance of vessels. It does not forbid such discriminations as between ports. Congress, acting under the commerce clause, causes many things to be done that greatly benefit particular ports and which incidentally result to the disadvantage of other ports in the same or neighboring States. The establishing of ports of entry, erection and operation of lighthouses, improvement of rivers and harbors and the providing of structures for the convenient and economical handling of traffic are examples. . . The construction for which appellants contend would strip Congress of much of the power that it long has been accustomed to exert and which always has been held to have been granted to it by the commerce clause. It is clear that the Constitution does not forbid the allowance for ferrying the Mississippi at Louisiana ports.

The other objection considered was that there was no evidence as to the cost of the ferry service, and no evidence to warrant a finding that the lower intrastate rates operate as a real and substantial obstruction to, burden upon, or discrimination against interstate commerce.

The Court found no requirement that the cost of each element of transportation service must be ascertained.

> While in the making of reasonable rates all the material facts are to be regarded, it has never been deemed necessary or practicable—if indeed it is at all possible—to ascertain in advance the cost to carriers of each of the various elements embraced in the transportation service. The Act does not require any such determination.

The facts established by the evidence were then summarized as to the discrimination against interstate commerce resulting from the lower intrastate rates prescribed by the Louisiana Commission.

Concluding that the facts supported the determination of the Interstate Commerce Commission as to substantial discrimination, MR. JUSTICE BUTLER said:

> Producers outside Louisiana are necessarily at disadvantage in respect of the sale and delivery within that State of such materials to the extent that the State rates are lower than the prescribed scale. In the course of the Commission's report it is said that the disparity between the two scales is bound to operate as a real discrimination against, and obstruction to, interstate commerce, and result in interstate shippers being unduly prejudiced and interstate commerce unjustly burdened. And in its ultimate findings the Commission states that the intrastate rates to the extent that they are lower, distance considered, than corresponding interstate rates would result in undue preference and advantage to shippers and receivers of freight in intrastate commerce within western Louisiana and in undue prejudice to shippers and receivers of freight in interstate commerce between points in Arkansas, Oklahoma and Texas and points in western Louisiana and in unjust discrimination against interstate commerce.
>
> The facts above stated are adequately supported by the evidence and are clearly sufficient to warrant the Interstate Commerce Commission in prescribing under §13 (3) (4), the schedule of intrastate rates under consideration.

The case was argued by Mr. Wylie M. Barrow for the appellants, by Assistant to the Attorney General John Lord O'Brian for appellees the United States and Interstate Commerce Commission, and by Mr.

Harry McCall for appellees the Texas and New Orleans Railroad Company et al.

State Statutes—Insurance—Arbitration

Provisions of the statute of Minnesota prescribing the use, by all fire insurance companies, of a standard fire insurance policy containing an arbitration clause construed as making the award of arbitrators conclusive on the amount of loss, but reserving questions as to liability for determination by the courts, are valid and within the police power of the state.

The Hardware Dealers Mutual Fire Insurance Company of Wisconsin v. The Glidden Company et al, Adv. Op. 65; Sup. Ct. Rep. Vol. 52, p. 69.

In this opinion, by MR. JUSTICE STONE, the Court upheld the constitutionality of arbitration provisions of the standard fire insurance policy prescribed by the statute of Minnesota. The question arose in a suit to recover the amount of an arbitration award made by an arbitrator designated by the insured and by an umpire appointed in accordance with the arbitration clause, after the insurance company had refused to participate in the arbitration. The state courts allowed recovery on the award.

The authority of the arbitrators has been held by the state courts to extend only to the determination of the amount of loss, upon which their decision is conclusive, unless shown to be grossly excessive or inadequate or procured by fraud. Questions of liability are reserved for the courts to determine.

The insurance company contended that the statutory provisions requiring the insertion of the arbitration clause in fire insurance policies infringes the due process and equal protection clauses of the Fourteenth Amendment.

In rejecting this contention MR. JUSTICE STONE first pointed out that such arbitration clauses have long been commonly used voluntarily. He then adverted to the specific objection here made to the power of the state to substitute arbitration in place of judicial procedure as the remedy to be pursued in fixing the amount of loss under policies.

> The right to make contracts embraced in the concept of liberty guaranteed by the Fourteenth Amendment is not unlimited. Liberty implies only freedom from arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community. . . Hence, legislation otherwise within the scope of acknowledged state power, not unreasonably or arbitrarily exercised, cannot be condemned because it curtails the power of the individual to contract. . .
>
> The present statute substitutes a determination by arbitration for trial in court of the single issue of the amount of loss suffered under a fire insurance policy. As appellant's objection to it is directed specifically to the power of the state to substitute the one remedy for the other, rather than to the constitutionality of the particular procedure prescribed or followed before the arbitrators, it suffices to say that the procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control. The Fourteenth Amendment neither implies that all trials must be by jury, nor guarantees any particular form or method of state procedure. . . In the exercise of that power and to satisfy a public need, a state may choose the remedy best adapted, in the legislative judgment, to protect the interests concerned, provided its choice is not unreasonable or arbitrary, and the procedure it adopts satisfies the constitutional requirements of reasonable notice and opportunity to be heard.

In addition to the presumption to be indulged in favor of the validity of statutes dealing with a subject within the scope of legislative power, the court summarized matters within its judicial notice which were sufficient to support the validity of the requirements here.

> Without the aid of the presumption, we know that the arbitration clause has long been voluntarily inserted by insurers in fire policies, and we share in the common knowledge that the amount of loss is a fruitful and often the only subject of controversy between insured and insurer; that speedy determination of the policy liability such as may be secured by arbitration of this issue is a matter of wide concern. . . that in the appraisal of the loss by arbitration, expert knowledge and prompt inspection of the damaged property may be availed of to an extent not ordinarily possible in the course of the more deliberate processes of a judicial proceeding. These considerations are sufficient to support the exercise of the legislative judgment in requiring a more summary method of determining the amount of the loss than that afforded by traditional forms. Hence the requirement that disputes of this type arising under this special class of insurance contracts be submitted to arbitrators, cannot be deemed to be a denial of either due process or equal protection of the laws.
>
> Granted, as we now hold, that the state, in the present circumstances, has power to prescribe a summary method of ascertaining the amount of loss, the requirements of the Fourteenth Amendment, so far as now invoked, are satisfied if the substitute remedy is substantial and efficient. . . We cannot say that the determination by arbitrators, chosen as provided by the present statute, of the single issue of the amount of loss under a fire insurance policy, reserving all other issues for trial in court, does not afford such a remedy, or that in this respect it falls short of due process, more than the provisions of state workmen's compensation laws for establishing the amount of compensation by a commission . . . or the appraisal by a commissioner of the value of property taken or destroyed by the public, made controlling by condemnation statutes . . . or findings of fact by boards or commissions which, by various statutes, are made conclusive upon the courts if supported by evidence.

The case was argued by Mr. Mortimer H. Boutelle for the appellant and by Messrs. Homer C. Fulton and E. M. O'Neill for the appellees.

State Statutes—Oil and Gas Conservation Act of California

The California Oil and Gas Conservation Act is valid on its face to confer jurisdiction on the Superior Court of that State to consider relevant questions of fact and to determine with respect to a particular field whether there has been an unreasonable waste of gas.

The statutory definition as to what constitutes unreasonable waste is not so indefinite as to render the statute invalid on its face.

As a regulation of the correlative rights of surface owners with respect to a common supply of oil and gas the statute is valid upon its face, and consequently objections to the statute as an unconstitutional restriction upon or deprivation of private property in the public interest without compensation cannot be considered abstractly and apart from the merits of the case.

Bandini Petroleum Co. v. Superior Court of the State of California, Adv. Op. 123; Sup. Ct. Rep. Vol. 52, p. 103.

This opinion by the CHIEF JUSTICE reviewed certain proceedings had in the state courts of California under the Oil and Gas Conservation Act of that State. That statute by section 8b prohibits the unreasonable waste of natural gas, and makes the blowing, release or escape of natural gas into the air prima facie evidence of unreasonable waste. Section 14 empowers the director of the department of natural resources to institute proceedings to enjoin unreasonable waste of gas,

and pursuant thereto that official sought and obtained a temporary injunction in the Superior Court against the appellants limiting the amount of gas which they might take from their properties.

The appellants then sought a writ of prohibition from the District Court of Appeal restraining the Superior Court and one of its judges from enforcing the injunction order. In this proceeding they attacked the jurisdiction of the Superior Court upon the ground that the Conservation Act violated the Fourteenth Amendment in that it afforded no definite standard as to what constitutes "waste" or "unreasonable waste," and unlawfully delegated power to the Superior Court to legislate on the subject; that it prohibited the appellants "from utilizing such amount of natural gas produced from their respective wells" as was "reasonably necessary to produce oil therefrom in quantities not exceeding a reasonable proportion to the amount of oil produced from the same well"; and in that the statute required the appellants to curtail their production of oil and gas "for the purpose of conserving such natural gas for the benefit of the general public" without eminent domain proceedings or just compensation, and was so arbitrary and oppressive as to be in excess of the power of the state. The appellants also assailed the provision of the Act as to what constitutes prima facie evidence of unreasonable waste, as violative of the due process clause. They asserted, finally, that the statute as enforced against them impaired the obligation of their lease contracts, contrary to the contract clause, and denied to them the equal protection of the laws.

The District Court of Appeal sustained a demurrer to the petition, and the State Supreme Court refused to review that ruling. The Supreme Court of the United States held that it had jurisdiction to review the judgment of the District Court of Appeal. In thus asserting jurisdiction of the Supreme Court to hear the appeal the learned Chief Justice specifically pointed out that the only question presented was whether the District Court of Appeal erred in deciding Federal questions as to the validity of the statute upon which the jurisdiction of the Superior Court rested.

> It follows that, in considering and deciding Federal questions in the prohibition proceeding, the District Court of Appeal must be regarded, as its opinion imports, as having determined merely that the statute was valid upon its face so that the Superior Court had jurisdiction to entertain the injunction suit. It is that determination alone that we can now consider.

In sustaining the ruling of the District Court of Appeal that the statute was not on its face so uncertain and devoid of any definition of a standard of conduct as to be inconsistent with due process the Supreme Court referred to an opinion of the Supreme Court of California describing the relationship between production of oil and the production of gas. It was there shown that with the release of gas from gas-tight domes formed by layers of rock the oil is lifted in solution with the gas, but that the combinations of factors affecting the lifting power of the gas in different localities vary greatly, so that legislation cannot be framed determining what is a reasonable proportion of gas to the amount of oil produced. That proportion however may be ascertained with a fair degree of certainty in each individual case.

> The statute is to be read with the construction placed upon it by the state court. . . . And so read, we find no ground for concluding that the statute should be regarded as invalid upon its face, merely by reason of uncertainty, so as to deprive the Superior Court of jurisdiction to consider the relevant questions of fact and to determine with respect to a particular field whether or not there has been the unreasonable waste of gas which the statute condemns.

No constitutional objection was found to the presumption of unreasonable waste prescribed in the statute.

> The appellants make the further contention that the statute is invalid because of the provision of section 8b (supra, p. —) that "the blowing, release or escape of natural gas into the air shall be *prima facie* evidence of unreasonable waste." The State, in the exercise of its general power to prescribe rules of evidence, may provide that proof of a particular fact, or of several facts taken collectively, shall be *prima facie* evidence of another fact when there is some rational connection between the fact proved and the ultimate fact presumed. The legislative presumption is invalid when it is entirely arbitrary, or creates an invidious discrimination, or operates to deprive a party of a reasonable opportunity to present the pertinent facts in his defense. . . . In the present case there is a manifest connection between the fact proved and the fact presumed, and under the construction placed upon the statute by the state court there appears to be no deprivation of a full opportunity to present all the facts relating to operations within the field.

In conclusion the statute was found valid on its face, to support the jurisdiction of the Superior Court, as a measure regulating the correlative rights of persons having oil or gas wells which draw from a common oil or gas supply and whose title in the product does not become absolute until the product is reduced to possession. The validity of the statute as an exercise of the police power of the state to protect the public interest was not determined.

> If the statute be viewed as one regulating the exercise of the correlative rights of surface owners with respect to a common source of supply of oil and gas, the conclusion that the statute is valid upon its face, that is, considered apart from any attempted application of it in administration which might violate constitutional right, is fully supported by the decisions of this Court. . . . In that aspect, the statute unquestionably has a valid operation, and it cannot be said that the Superior Court was without jurisdiction to entertain the suit in which the injunction order was granted. That was all that the District Court of Appeal determined in the judgment now under review. It is not necessary to go further and to deal with contentions not suitably raised by the record before us. Constitutional questions are not to be dealt with abstractly. Having jurisdiction of the suit the Superior Court had authority to take steps to protect the subject. matter of the action pending the trial on the merits. The injunction order stated that to be its purpose. Upon the trial, all questions of fact and of law relevant to the application and enforcement of the statute may be raised and every constitutional right which these appellants may have in any aspect of the case as finally developed may be appropriately asserted and determined in due course of procedure.

The case was argued by Mr. Robert B. Murphy for the appellants and by Mr. James S. Bennett for the appellees.

Taxation—State Taxes—Discrimination

An intentional systematic undervaluation by state tax officials of taxable property of the same class belonging to other owners contravenes the constitutional right of one taxed upon the full value of his property. The same principle applies where all owners are assessed upon the basis of 50% of the actual value, where the tax officials, in determining the actual value, intentionally and systematically exclude from consideration elements obviously affecting actual value where such factors bear upon some lands assessed but not upon other lands subject to the assessment.

Cumberland Coal Co. v. Board of Revision, Adv. Op. 131; Sup. Ct. Rep. Vol. 52, p. 48.

In this opinion by MR. CHIEF JUSTICE HUGHES, the Supreme Court considered the constitutional validity of certain assessments of coal lands in Pennsylvania,

for taxation. The plan adopted by the tax officials of that State, and sustained by its courts, in the illustrative case cited in the opinion as typical of others, was to assess all virgin coal property in a township, as distinguished from "active coal' property which is opened and mined, at $260 an acre. The basis for assessment was at 50% of the amount taken as the actual value. But in arriving at the amount taken as the actual value per acre of properties in a township the Commissioners ignored differences in value due to location, transportation, and other factors affecting value. Thus, some of the properties were shown to have a value of $1,000 per acre, though assessed at only $260 per acre on the 50% basis adopted by the Commissioners.

Reviewing the question on a writ of certiorari the Supreme Court concluded that the plan as adopted and carried out was violative of the equal protection clause of the Fourteenth Amendment. Stating the constitutional objection to it, MR. CHIEF JUSTICE HUGHES said:

> We are unable to agree with this view. It is established that the intentional, systematic undervaluation by state officials of taxable property of the same class belonging to other owners contravenes the constitutional right of one taxed upon the full value of his property. . . . In *Sioux City Bridge Company v. Dakota County*, (260 U. S. 441), this Court, referring to the dilemma presented by a case where one or a few of a class of taxpayers are assessed at one hundred per cent, of the value of their property pursuant to statutory requirement and the rest of the class are intentionally assessed at a lower percentage, stated the rule to be as follows: "This Court holds that the right of the taxpayer whose property alone is taxed at 100 per cent. of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute. The conclusion is based on the principle that where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law."
>
> In applying this principle, the fact that a uniform percentage of assigned values is used, cannot be regarded as important if, in assigning the values to which the percentage is applied, a system is deliberately adopted which ignores differences in actual values so that property in the same class as that of the complaining taxpayer is valued at the same figure (according to the unit of valuation, as, for example, an acre) as the property of other owners which has an actual value admittedly higher. Applying the same ratio to the same assigned values, when the actual values differ, creates the same disparity in effect as applying a different ratio to actual values when the latter are the same. If the Commissioners, in the instant case, had taken the basis of one hundred per cent. instead of fifty per cent. of the assigned values, but had adopted the same method of assessment by which all the coal in a township (aside from active coal) was assessed at the same value an acre, despite well known and important differences in value, the result would have been an undervaluation of similar coal belonging to other owners, which would have brought the case of the petitioners within the principle of the decisions cited. In such case, if the petitioners' property had been valued at one hundred per cent. of its actual value, the like property of the other owners, having a higher actual value, would in effect have been valued at less than one hundred per cent. The discrimination is essentially the same, and is equally repugnant to constitutional right, when both assessments are made on the basis of fifty per cent. of assigned values and differences in actual values are deliberately and systematically disregarded. The undervalued property is in effect valued at less than fifty per cent. of its actual value; for example, coal of the same description worth twice as much as that of the Cumberland Coal Company was really valued at twenty-five per cent. of its actual value.
>
> The petitioners are entitled to a readjustment of the assessments of their coal so as to put these assessments upon a basis of equality, with due regard to differences in actual value, with other assessments of the coal of the same class within the tax district.

The case was argued by Mr. Arthur B. Van Buskirk for the petitioners, and by Mr. Challen W. Waychoff for the respondent.

The Lawyer in Business

A LAWYER engaged in the real estate business in New York City recently submitted an advertising card to the Committee on Professional Ethics of the New York County Lawyers Association and asked its opinion of its propriety. The card merely contained his name, the words "Real Estate" and the address. "It is understood," he said in requesting the opinion, "that any services I might render in the above capacity would be performed without holding myself out as an attorney and that in the performance of said services I would regard myself as bound by the ethics of the legal profession." The Committee replied:

"Answer No. 295.—The Committee adheres to its opinion already expressed in answer to Questions Nos. 114 and 179 that there is not any accepted standard of professional propriety condemning a lawyer for engaging in business while in active practice, and that he may, with propriety, advertise such business. Under the conditions stated in the question, the proposed advertisement, in its opinion, is not objectionable. (See also Committee's answer to Question No. 284.)

"The following is an extract from answer to Question No. 179 referring to answer to Question No. 114: 'In that answer the Committee has expressed its opinion, to which it adheres, that there is not in this country any accepted standard of professional propriety which warrants condemnation of a lawyer for engaging in business while in active practice; but that if he does so he must conduct his business with due observance of the standards of conduct required of him as a lawyer; that the business must not be inconsistent with his duties as a member of the legal profession; and that it is improper either to make the business a means for the solicitation of professional employment, or to put the solicitation of business upon the ground that he is a lawyer.'"

Bureaus for Study of Exotic Customary Law

THE vast portion of the world area that is governed today by exotic customary law is brought strikingly to the attention in a circular recently issued, signed by Prof. René Maunier of the University of Paris and Prof. C. Van Vollenhoven of the University of Leyden. The "Salle de travail d'ethnologie juridique," founded in 1929 in the Faculty of Law of the University of Paris, the circular states, "has resolved to declare itself prepared to act provisionally as a central bureau for the study of exotic customary law, in the sense that it undertakes to bring the scattered students, who often have not heard of each other, into contact." The nature and extent of the field to be cultivated, and other information about the project, are set out as follows:

I. Half the globe is still under the sway of non-codified Oriental and Tropical law. The anticipation of the

Nineteenth century that these law systems were destined to disappear shortly has not been fulfilled, and juridical science acknowledges their importance more and more. Moreover, article 9 of the statute of the Permanent Court of International Justice at the Hague (1920), while it guarantees equal respect to the various juridical systems of the world, seems to take this exotic law under its protection as well as European law.

II. The difficulty is to know its tenor, to study its contents without prejudice and to know who are the persons occupying themselves with it.

III. By way of a provisional sketch and for practical use, we may distinguish eight systems of exotic law, namely:

a. Oceanic law;

b. Japanese, Chinese, Annamite and Siamese law. Even in case these systems of law should be codified in the modern manner, traditional and popular law would not suddenly disappear; to know it would still remain indispensable for the purpose of applying and interpreting these codes, such as they live in the daily life and as they are embodied in the jurisprudence;

c. Indonesian law (Formosa, the Philippines, the Dutch East Indies, Malay Peninsula, etc., the Chams of French Indo-China, Madagascar). The International Academic Union, founded in 1919, has just evinced its interest in a practical way, by taking up the printing of a provisional dictionary of Indonesian law, which undertaking is subsidized by six nations;

d. The indigenous law of India;

e. The law of western Asia;

f. The indigenous law of northwestern Africa, of Tripoli and of Egypt;

g. The indigenous law of central and south Africa;

h. The law of the indigenous populations of north, central and south America.

IV. In order to facilitate the study of these systems of law, we need to know first the work that has already been done and the various persons (students of law or not, and especially those who live on the spot) on whose collaboration we may rely.

V. For the study of Indonesian law (see above III c) the Dutch have founded at Batavia an "Adat law Section" (1926) of the Royal Batavian Society of Arts and Sciences (1778) and at Leyden an "Adat law Foundation" (1917). An inquiry will be instituted in the Philippines in 1931. A "List of books and articles on the customary law of Indonesia" of 455 pages was published in 1927. These organizations and their publications supply the wants of juridical ethnology in a fragmentary way only.

VI. For this reason and at the instance of the Adat law Foundation at Leyden mentioned above, the "Salle de travail d'ethnologie juridique," founded in 1929 in the Faculty of Law of the University of Paris, has resolved to declare itself prepared to act provisionally as a central bureau for the study of exotic customary law, in this sense that it undertakes to bring the scattered students, who often have not heard of each other, into contact. It therefore calls upon all those who are able to give information about data concerning the non-codified law of one of the eight groups mentioned under III. It proposes to publish all information received in a bulletin once or twice a year in order to gradually furnish the indispensable organization for this study, the urgent need of which is felt more every day.

VII. Communications may be addressed to M. le professeur René Maunier, 7 avenue d'Orléans, à Paris-14e.

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The Journal is prepared to furnish a neat and serviceable binder for current numbers to members for $1.50. The price is merely manufacturer's cost plus expense of packing, mailing, insurance, etc. The binder has back of art buckram, with the name "American Bar Association Journal" stamped on it in gilt letters. Please send check with order to Journal office, 1140 N. Dearborn St., Chicago, Ill.

The Ethics of Advocacy

(*Continued from page* 853)

conduct upon the part of many lawyers practicing in bankruptcy."

All this was part of the larger truth that education which supplies information and not the wisdom and incentive for its right use, is pernicious. The ideals of personal advantage are easily adopted by human nature. The ideals of service are preserved only by eternal vigilance. In June, 1905, addressing the Harvard Alumni at Cambridge, Theodore Roosevelt was able to say:

"We all know that, as things actually are, many of the most influential and most highly remunerated members of the Bar in every center of wealth make it their special task to mark out bold and ingenious schemes by which their wealthy clients, individual or corporate, can evade the laws which are made to regulate in the interest of the public the use of great wealth."

When leaders of the Bar were thus separating precept from practice and making of the law a business rather than a profession, lesser members were naturally infected thereby. This supreme aim of money making laid the foundation of many abuses of advocacy which have not altogether been destroyed even yet. Then was the beginning of the bankruptcy ring, the ambulance-chasing business, the divorce mill, the advertising for clients, the general commercialization of the law. This low standard of the times was well described in 1914 by the chairman of a Committee on Disbarment (Justice Deemer, Proceedings Iowa State Bar Association, 1914, pp. 168, 169), when he said:

"I might suggest that thirty or more years ago when the boys were so precocious that they only needed nine months reading of the law for admission to the Bar, that dear old and learned man, Chancellor Hammond, used to tell us to read Sharswood's Legal Ethics, which covered at least some of the duties and responsibilities of the lawyer. They then taught professional ethics in the law schools. But after a while all of us got into the activities of commercial life, during the 'steel age,' as it is called, of the last half of the nineteenth century, and the lawyer was becoming commercialized, and they quit teaching professional ethics in the schools; and according to the reports of the Supreme Court of the United States and of some of the various investigating committees, I think it might be called the s-t-e-a-l age. We almost abandoned the thought of there being any ethics in our profession and law schools quit teaching it and lawyers quit practicing it."

But even as these words were spoken, the conscience of the Bar had begun to stir itself. That very year—1914—saw the approval of the Canons of Ethics by the Bar Associations of thirty states. The profession began the rediscovery of its philosophy of social service. Education in professional ethics began to creep back into courses of instruction in the law. The Bar is recalling again the advice uttered in 1710 by Cotton Mather in the course of the first address to the American Bar:

"You will be sincerely desirous that Truth and Justice may take place. You will speak nothing which shall be to the prejudice of either. You may, gentlemen, if you please, be a vast accession to the felicity of your country."

The increasing efforts of Bench and Bar to rid the profession of abuses and to elevate by precept, discipline and education the ethics of advocacy are among the most striking and encouraging features of the present history of legal practice. As said by Judge (now Solicitor General) Thacher in closing his report upon the investigation which disrupted the bankruptcy ring in New York City:

"This is but another instance in which the profession in its organized and individual capacities has rendered unselfish and unrequited services in the improvement of the administration of justice. One cannot doubt that the effort will be continued until confidence in the law and pride in its administration have been restored."

THE POWER QUESTION—LET US NOT GO REVOLUTIONARY

Economic Policy and Political Philosophy Which Should Animate the Government in Its Approach to This Question—American Idea of Governmental Sovereignty as Applied to Problem of Public Utilities—Government Ownership and Propaganda—A Political Machine Staggering in Magnitude—Power of States Over Rates and Service, Etc.*

By Hon. Albert C. Ritchie
Governor of Maryland

I KNOW of no public question in which law and economics are more intimately interwoven than they are in the public utility question. And I know of no question which is being more confused by politics.

It has become the fashion in certain quarters to see monopolistic abuses and capitalistic exploitation of natural resources and of consumers and taxpayers in almost everything certain utilities do, and to demand drastic governmental action.

Justly or unjustly the public utilities seem to be more or less under suspicion. Perhaps this is due in part at least to the fact that through natural economic evolution the utilities are generally monopolies, and by tradition monopolies are odious. It is hard for some people to believe that there can ever be a good monopoly, or indeed that any of them ever try to be good.

Then, too, our utilities are all corporate entities, and the popular concept is that corporations have no soul or conscience, and therefore are not animated by the ordinary moralities and amenities,—to which one might answer, as did Thoreau, that after all a corporation of conscientious men is a corporation with a conscience.

We may as well start, however, by admitting that the utilities have not been free from their share of faults. The ambition to build up great fortunes and the concentration of power through the merger of innumerable independent concerns, either by consolidation or by the device of holding companies, has doubtless led to instances of manipulation or exploitation in the utility field, as the same things have done in other fields, and the whole range of public utility operations is admittedly one calling for public scrutiny and supervision.

The question, of course, is what should society do in order to protect itself, and to guide and direct utility operations for the public good. What is the economic policy or, if you will, the political philosophy which should animate government in its approach to this question?

When you come to analyze the demands for drastic action, you find that they generally involve the idea of government ownership. This is true of the agitation now going on with respect to the power industry, against which the attack upon the utilities is at present concentrated.

Senator George W. Norris of Nebraska, perhaps the leader in this movement, proposes, to quote his own words, "a great combination . . . by the pooling of these natural resources, and by uniting all available means for the generation and distribution of electric power." Under his plan the municipalities would produce and distribute the power under State regulation, and where, to quote him again, "it becomes a State-wide venture in which the State as such engages, the State should operate under National regulations. The National Government itself will ultimately operate when and where it is most feasible." (Public Utilities Fortnightly, March 6, 1930.)

Senator James Couzens of Michigan proposes a Federal agency to pass upon rates, charges and service wherever any interstate current is involved. (Public Utilities Fortnightly, August 7, 1930.)

Governor Gifford Pinchot of Pennsylvania, in his speech at the Governors' Conference in French Lick, Indiana, June 2, 1931, said: "The problem can only be solved under the leadership and by the action of the Nation itself, assisted and supported, of course, by the coordinate action of the individual States."

These proposals, advanced with the almost passionate earnestness of crusaders, show an amazing loss of confidence in individual initiative and responsibility and in the power and effectiveness of State government.

There may be in this vast country power resources so special in their nature, governed by conditions so exceptional, that the public welfare may require special and exceptional treatment. Muscle Shoals—a war product and a war liability—is one. Indeed that is so special and so exceptional that the combined wisdom of many sessions of Congress advised by two Presidents has not been able to work it out. Boulder Dam may have been another such instance, but the Federal Government has already decided its policy there and it is now being carried into effect. Cases like these, however, are very rare. They cannot be permitted to determine the national policy on the subject.

The national policy, it seems to me, must not be government ownership. The capitalistic system has its defects, of course,—period of forced unemployment is perhaps the worst,—but it has centuries of evolutionary growth back of it, and under it we have come to lead the nations of the world

*Address delivered before the Section of Public Utilities at Atlantic City, 1931.

in every form of progress. I do not believe in crippling it.

Our political ideal always has been to encourage private enterprise, to bestow upon it the earned rewards of brain and labor, and to keep open the door of opportunity. Here, I believe, is the key to our material success. Here is a political ideal worth guarding and worth fighting for.

In spite of the inequalities of wealth and fortune, innumerable forces of amelioration, of socialization and of equalization are at work, all along lines which are sound and germane to our institutional growth.

Industry now cares for its injured, it looks to social welfare, it arbitrates its own controversies, it sets up its own trade schools, it strives for higher rather than lower wages, it encourages labor to share in both ownership and management, it shows signs of trying to use rather than abuse competition. It is beginning to tackle the problem of providing in good times for forced unemployment in hard times. It tends more and more to serve rather than to exploit. As Owen D. Young has said, business management is coming to think "in terms of human beings." In all these ways it is working towards the ideal of avoiding government regulation by regulating itself.

When you come to the extent to which government should enter the domain of business, and own, manage or control activities hitherto left to private capital and enterprise, you are confronted by issues that are as revolutionary as they are difficult.

If government ownership is so desirable for public utilities, one might ask why not apply it to every business in which the public has an economic interest,—and what business is there in which it has not,—from foods, fuels, clothing, houses, amusements and luxuries on down the line? If it is economically advisable in the one case, why is it not equally so in the others?

The American idea of governmental sovereignty is to define and limit governmental powers. It leaves the individual as free as possible to work out his own destiny. It protects him in his rights and in his property. It does not permit the government, in the name of the people, to absorb business or undertake enterprises beyond the legitimate needs of public administration.

Our detours from this principle are already too many. There should be no more. It is still true, as Buckle concluded after his long study of the history of civilization, that the chief province of government is to maintain order, to prevent the strong from oppressing the weak, to see to the public health, education and other governmental functions, and that the history of economic legislation is largely a history of mistakes.

We should give proper weight to these considerations in our attitude towards the utilities. That we should have the necessary measure of control over such natural resources as are administered for the common weal is too obvious for argument, but this does not mean that private capital and enterprise is not still the best way to develop and operate them.

I have said that the power industry has its faults. That it has was abundantly shown in the investigation before the Federal Trade Commission. One of these, frequently urged as a reason for nationalizing the industry, was the propaganda circulated by certain interests in schools and colleges against public ownership, with deliberate concealment of its source. This, said Senator Norris, "shocked the Nation." It was, he said, an effort directed at "poisoning the minds of children, and leading them into their (the industry's) camp."

It may be said in passing that the power interests responsible for this had high precedents in high places. Prohibition organizations not so long ago fostered courses in the public schools on the effect of alcohol and tobacco on the human system. The American Tariff League propagandized for a high tariff in every school that it could reach. The League's Secretary, Dr. Arthur L. Faubel, so testified before the Caraway Lobby Investigating committee last January, and undertook to justify it on the ground that most college professors believed in low tariffs, and their teachings ought to be counteracted.

I do not, however, recall these matters with any idea of justifying the power interests in what they did. No one should question their right or even their duty to present their side in every proper forum and to make every legitimate appeal to the public for understanding and just treatment. But in this they went too far. What they did was not openly done, and it tended to sap the springs of free and untramelled thought. I sometimes think that the crime which should rank next to treason in a democracy is that of adroitly and deliberately trying to fool the people. In this matter the power interests did a dumb and asinine thing. But that does not justify the country in rushing head-on into an unsound and un-American policy.

The big shipbuilding firms did an asinine thing too when they employed "Big Bass Drum" Shearer to break up the Geneva Conference on Disarmament, but that does not justify an unsound policy towards shipbuilding.

The gentlemen who employed President Hoover's friend Shattuck for $75,000 to influence the President on the sugar tariff, also did an asinine as well as a futile thing, but that does not justify an economically bad tariff on sugar.

If Mr. Edward Cornell Jameson read in the newspaper that a considerable part of the $65,000 he gave Bishop Cannon for the anti-Smith campaign in 1928 had found its way into the Bishop's personal accounts, he probably thought that he had done an asinine thing too, but that is no reason to pass any unsound legislation on the subject of campaign contributions.

Moreover, the government ownership people are pretty fair propagandists themselves. They have the Public Ownership League of America, the Peoples' Legislative Service, the League of Industrial Democracy and the National Popular Government League all operating in Washington, and all securing free distribution of their propaganda by means of the "leave to print" rule.

Senator Norris says that "not in the history of the world has such an attempt been made by any monopoly to control every avenue of human activity," and that the power interests are "determined to control the politics of this Nation from

the village to the White House." (Public Utilities Fortnightly, March 6, 1930.)

Governor Pinchot said at French Lick: "The power of the Public Utilities is manifest in every political assembly, from the Congress of the United States to the smallest town meeting, and from the government of the least political unit to that of the largest State. Indeed, it reaches to the National Government itself." And further: "How heavily every home is being drained is shown by the fact that last year when the depression visited virtually every other industry, the utility companies increased their profits over $44,000,000."

It would be hard to beat these statements for extravagance, and I have never heard of any bill of particulars to support them. In fact the only specific assertion in them, namely, that the utility companies increased their profits by more than $44,000,000 in 1930, has since been shown to be erroneous, in that this increase was not in profits but in gross earnings. And how can it be true that "every home is being drained," when the statistics of the National Electric Light Association show that electric rates have gone down 31 per cent since 1913, while the cost of living has gone up 57 per cent? The truth is that the electric bill is generally the smallest item in the family budget. There is no clamor for less rates. The clamor is for more service.

Perhaps the instance most frequently cited for the success of public ownership is Ontario. I venture the assertion that in Ontario Sir Adam Beck built up a great political machine on an ecomonically unsound project, which sells current to domestic consumers at less than fixed charges and the cost of production and distribution, and that the industrial users and the taxpayers pay the losses.

Indeed I would like to see all government owned projects subjected to a simple test. Regard them as if they had to stand on their own feet, as if they had to keep their books as privately owned enterprises of like character must keep theirs, and pay taxes on the same basis. Regard them as if the national, state or municipal credit was not behind them, and as if their charges and losses could not be buried in general government accounts. Do that, and I venture to say that nearly all will show operating deficits.

Senator Norris says that "unless we retain our natural resources we will be the economic slaves of the private power industry." My fear is that if his plan were adopted we would be the economic slaves and the political slaves as well of the Federal Government.

We have feared economic serfdom before, and public ownership has been advanced as the remedy. Today it is the power industry. Not so many years ago it was the railroads. Well, the World War came and the Government as a war measure took over the railroads. It turned them back again disorganized and demoralized, with tracks, equipment and rolling stock run down.

Since then the railroads have been sorely beset. On the one side they are beset with stringent Federal regulations and standards. On the other they are beset with competition by commercial airships in the air, by pipe lines under ground, by government owned barge lines on the water and by motor buses running over State built and State maintained rights of way.

But they are not beset any longer with threats of government ownership. We have heard nothing about government ownership of the railroads since we tried government operation of them.

I have said that government ownership of the power industry would make us political slaves of the Federal Government. By that I mean that it would result in a political machine staggering in its magnitude. That is what has happened in Ontario. It would just as surely happen in this country.

In 1930 there were 275,000 people employed in the electric light and power business,—234,000 men and 41,000 women. The salaries and wages paid them, based on the payments actually made to those employed in 1927 as shown in the United States Census report of that year, was $435,000,000. It staggers one to think of this vast organization as a new arm of the Federal Government, with its operating efficiency diminishing under the red tape and routine of governmental administration, and with its potency for political and partisan use. Nor are these statistics complete, because they cover operating enterprises only. It is estimated that the holding companies employ 25,000 additional persons.

The taxes paid by the power industry would, of course, be lost in case of government ownership. In 1930 these taxes amounted to $200,000,000, of which over 32 per cent went to the Federal Government, from 10 to 15 per cent to the State Governments, and the remainder to the various cities and counties. These taxes amount to practically 10 per cent of the gross revenues of the power companies. If the industry stops paying this enormous sum towards the support of government, as it would do if government took it over, then the already overburdened taxpayers of the country would have to dig down in their pockets and make it up. Thus a movement whose alleged purpose is to help the public would tax the public $200,000,000.

These are some of the evils which I believe would result from Government ownership of the power industry, and I believe that within lesser radius the same evils would result from State ownership too.

I need not repeat here the views I have so often expressed on the subject of local self-government. I like to remind my Republican friends in the Federal Government, who are so strong on it in words but so short on it in practice, of the ringing declaration of President Lincoln that "the maintenance inviolate of the rights of the States and especially the right of each State to order and control its own domestic institutions according to its own judgment exclusively is essential to that balance of powers on which the perfection and endurance of our political fabric depends."

Just as it is the State's right to safeguard its institutions, it is both its right and its duty to safeguard its resources too, and so I would not deny to the people of any State the right to protect and develop their power resources in whatever way may seem to them best adapted to that end. But I do not believe there are many instances in which State

regulation will not amply suffice, rather than any form of State ownership.

I know this is true about my own State of Maryland. We both import and export power, but we have no interstate power problem. Our imported power is about 25 per cent of the total consumed, and most of it is produced at Holtwood on the Susquehanna in Pennsylvania. It is sold to the local company in Baltimore, to augment the supply produced by that company's steam plants there. The contracts under which it is sold are subject to the supervision of the Maryland Public Service Commission. The price approximates the low cost at which the local company produces its own current. If the price were excessive, the Maryland Commission would disallow the excess in fixing rates.

We export between 55 and 60 per cent of the power we produce. Substantially all of this is produced at Conowingo on the Susquehanna. The plant was built by the Philadelphia Electric Company, and as it lies partly in Maryland and partly in Pennsylvania, it was built under concurrent orders of the Pennsylvania and the Maryland Public Service Commissions. The project is limited to a return of seven per cent on actual cost. The Philadelphia Electric Company gets the current at substantially the cost of its production, and this includes a large amount of taxes paid in Maryland. The rate at which it is sold in Pennsylvania is completely under the control of the Pennsylvania Commission.

What is thus done in Maryland and Pennsylvania can be done elsewhere, and I believe that by and large the States have ample power to regulate and prescribe fair rates and adequate service and to enforce them.

In his speech at French Lick Governor Pinchot said that "under a multitude of Supreme Court decisions the states have no power to regulate, prohibit or burden directly the transmission of property like gas, oil and electricity between the States, or to disturb such interstate commerce by regulation of rates or prices, except by the clumsy device of compacts between the States."

Aside from the fact that the amount of current passing in interstate commerce is only about 13 per cent of the total kilowatt hours consumed,—and this fact is important,—I submit with very great respect that the Governor is mistaken in his proposition.

The distribution of power in any State is a local matter in that State. It is an operative function. The power has lost whatever interstate character it had, and the company which distributes it is subject to the State law as to both rates and service. The State Commission, under a proper State law, has or can demand all the sources of information it needs to determine fair rates and adequate service and to compel both. If the distributing company purchases its power from an importing company, the State Commission need not regard the terms of the contract if they are excessive. The Commission can disallow the excess in fixing rates, and the distributing company when it makes the contract knows that the Commission has that right.

The States have the power. All they have to do is exercise it. They can have just as strict a measure of control over rates and service as their people want to have. If any of them are content with weak commissions or with weak laws, that is their own misfortune, and most certainly it is no reason for saddling the burdens of public ownership on the people.

I am familiar with the arguments on both sides with respect to the status of holding companies. The question is mainly one for the protection of those who hold the securities. I do not say that the practices of some of these companies are above criticism. I do not go as far as some of the utilities do in saying that their capitalization has nothing to do with rates. But I do say that they present no problem which justifies government ownership in any form.

If our system of State regulation has not everywhere accomplished all that it is capable of, then it should be built up and strengthened where it is lacking, and through the Anglo-Saxon processes of experiment and trial and error we are daily doing this. Far more is to be expected from strong State commissions, (with some degree of that higher interstate concord and cooperation and uniformity which I think I see coming in this and other lines), than will ever be realized for either the consumer or the utility from too much concentration in government, State or Federal. That tendency has gone much too far for safety as it is.

All this is far from the gospel of *laissez-faire*. Human relations and institutions have become so complicated and inter-related, that the creed of ultra individualism which gave rise to that doctrine can no longer be accepted as a working political philosophy.

Nevertheless I am for the irreducible minimum of legislative interference in every field of human effort,—including the public utilities. In this era of triumphant industrialism, all of us recognize that the possibilities and actualities of special privileges, of injustice and of exploitation are so great that some adequate system of checks and balances must be supplied. But why look only to Government to supply it?

Governmental interference in human affairs means an excess of power. It means bureaucratic centralization, and sterilization and undue impairment of individual rights and liberties. In business it becomes more of an incubus than a help. It can hector and harass so much easier than it can guide and guard. It can so readily do more harm than good, even where only good is intended.

None of us can be sure that we understand the forces at work in our day and generation or that we can foresee their outcome. We must keep in mind the enormous potential bearings of what we do, both for today and tomorrow.

Should we not then try to make public opinion operate upon industry direct? Indeed may we not expect industry itself, for its own security and in the hope of its own salvation, if for no other reason, to work out self-governing ways of eliminating any ills and injustices which not only the public but enlightened business itself should not tolerate?

Personally, I have faith in this expectation. The logic of events favors its realization. Industry must be blind indeed if it does not realize that it must put its own house in order, and there are many evidences that it is trying to do so. This depression has at least one benefit to its credit. It has

awakened business to the necessity of a more enlightened and constructive statesmanship of its own.

I hold no brief for any of the utilities, but I know that the development of power has added immeasurably to the wealth of the nation, and it is not old wealth taken from others by the processes of trade, but new wealth wrung from the treasure house of nature. This involves a high order of initiative and enterprise. It calls for risks for which capital has the right to its just return.

Above all, we ought not to regard this utility and power question as a legitimate political issue in any partisan sense. Its ultimate bearing and meaning still lie in the lap of the gods. No one foresaw the startling changes wrought by the automobile. No one knows now what changes the Deisel engine or the auto-gyro may cause. Likewise power is transforming the world, and we can not yet know the end.

The subject is one for the best brains of the land, regardless of party. No good can come from trying to frame political issues about it or from treating it from any other than an economic standpoint.

It is true that the manufacture of political issues has become something of a national industry, but I am as strong for politics in a partisan sense keeping out of the utilities as I am for the utilities keeping out of politics.

I have more confidence of a beneficent outcome under enlightened business leadership, with a minimum of governmental interference, than I have of getting very far by making this the football of politics and politicians. And without meaning to question anybody's sincerity, I may be permitted to wonder whether gentlemen who discourse so extravagantly and so passionately on the subject are not really laying down a barrage or a smoke screen with which they hope to hide other issues,—such, for example, as prohibition,—about which they may not think it politically wise to speak so boldly.

So let us remember that power development is still in the making, and let us avoid too many noble experiments which may check or chill it.

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

SELECTED Articles on Censorship of Speech and the Press. (The Handbook Series, Series 3, Volume 5.) Compiled by Lamar T. Beman. 1930. New York: The H. W. Wilson Co. Pp. 507.—That some censorship of spoken or written speech is a social need is a true but empty platitude. If we are discussing not despotisms, like the present governments of Poland, Italy, and Russia, but societies on the model of Great Britain, Denmark, or the United States, then censorship is irrational and ridiculous unless it expresses a view that is almost unanimous.

Perhaps we need not worry too much about the fate of Socrates, even though he seems to be the earliest case, and is, with Jesus and Galileo, in the first rank for frequency of citation. He has been dead a long time, and, as far as I know, Greek law and opinion did not undertake to allow the degree of dissent provided for in the Constitution of the United States. It was more to our purpose when Eugene Debs, with the assent of the Supreme Court, was put in jail, and kept there a long time after the war ended, because he said it was wrong to force young men to disembowel other young men to make the world safe for democracy. I am of the opinion that if exactly the same set of facts could come before the Supreme Court today there would be an opposite decision, not because of change in personnel (the most liberal members voted to uphold the censorship), but because perspective has changed.

Censorship no longer undertakes to protect Genesis, or monogamy, and even when the most active and tiresome minority, to-wit, the Communists, are treated severely, it is not usually by official action, but by private groups. There is, to be sure, some tendency to punish individuals on wholly other grounds, whom we probably should not have punished had we liked their opinions, as in the episodes of Tom Mooney and Sacco and Vanzetti. I have long wished that some rich man would hire a vast hall in New York and give it free to those who wish to overthrow our form of government and all property rights, for as long as they can successfully undertake to get a thousand persons into the building to hear speeches, say five times a week; the gift to end when audiences can no longer be induced to listen, or at least to attend. Others, less generous than I, might not go so far, but most of us must agree tnat in the United States today there exists no condition that justifies repression of opinion. It is not enough that a speaker urges violence; he should not be stopped unless somebody seems likely to act on his advice. Jefferson maintained that correction of false opinions by true, along with the punishment of

overt criminal acts, formed "safer corrections than the conscience of a judge"; and certainly he would have been willing to add "or the conscience of a censor."

The police power we have always with us, and usually it goes along with public opinion, often foolish, but fleeting. It may break up a meeting to discuss birth-control, or drive from the stage *Widowers' Houses* or *Damaged Goods,* but it has not the established threat of official censorship continually in action. Chief Justice Hughes has said: "Some of the most menacing encroachments upon liberty invoke the democratic principle and assert the right of the majority to rule." We can scarcely prevent the majority from having its way when it is excited, but we may confine its despotism to moments of bigoted feeling, which are easily cut short if intelligent minority opinion is alert. Whatever the needs of the moment, or the exaggerations of temporary alarm, the ultimate purpose sought by the intelligent must be in accord with the ideal thus expressed by Brooks Adams: "Freedom of thought is the greatest triumph over tyranny that brave men have ever won."

One of the most interesting extracts in the interesting collection here brought together has to do with that new form of speech, the radio, through which a whole nation, and more than one nation, can be reached in a single speech, perhaps more easily than the Athenian orator reached the free citizens of his single city. Mr. Kaltenborn, one of those publicists who discuss public events regularly on the radio, relates that when he cautiously expressed the opinion that Russia should be recognized, something happened in Washington, and the contract of his newspaper was unceremoniously cancelled by the radio company, and since that time, in spite of Kaltenborn's popularity, the American Telegraph and Telephone Company has steadily barred him from its station, although the Brooklyn *Eagle* has several times offered the current rate of ten dollars a moment to put him back on the air through WEAF.

This is a difficult matter at the best. In the very nature of wave-lengths, with the limit to the number that can be used without confusion, control by the Federal Government seems to be necessary. It is possible, as Mr. Kaltenborn suggests, that if the Brooklyn *Eagle* were a Republican paper the result might have been different, and there is complaint from those who hold minority opinion in politics and also in religion. I have myself several times been through the censorship exercised by the various stations, but have not found it oppressive, nor have I seen any practical way, so far, of avoiding it. The vast air audience does not wish what it calls propaganda, unless it is definitely arranged as such, as in a political campaign. Just now it is submitting to such a mass of advertising through this medium that some listeners are wondering how soon there may come an effective protest. Possibly the hearers will adapt their mental habits to this commercial absurdity, as readers of magazines have apparently become reconciled to chasing a story and articles from one page to another far away, where it trickles down between the advertisements in the hope that the reader's eye will stray. The problem of the air is so new, with such important novel elements, that it would be unreasonable to expect at this time anything like a satisfactory method or formula of control.

To the theatre and the moving picture this volume makes but a single brief passing reference, and therefore that aspect of censorship is outside the scope of a review; but it does seem apposite, while we are thinking of the radio, to observe that the cinema offers a problem more difficult than that of the theatre, because of its cheap prices, huge numbers, and appeal to children, and that therefore the question of reasonable control can by no means be settled by a mere stand on the principles of freedom. In a way, the moving-picture is as specially conditioned as the radio, and in a class largely different from ordinary speeches, books, magazines, and newspapers. The big unit of life may have its advantages; at any rate it has its horrid drawbacks.

In a time when standards, social habits, and faiths change more rapidly than ever before, it may seem futile to give much worry to the slight effect that any censorship has, or is likely to have. But we know little about the future, even the future of not many years away. In three years we have seen a lessening of our confidence that systems in this favored country must remain as they are. We are leaving one era, in industry, and entering another, which we do not perceive, even dimly. On so momentous a voyage we shall need our tested lights, and high among them is that confidence in the outcome, if truth and error are allowed a contest in the open, that has been a cardinal point in the faith of the men we most revere. The nuisance law of Minnesota, around which the contest over censorship is centered now, is an excellent fighting ground, since the law has been used, not for punishing offenses against the morality or taste that happens to prevail in the community, but for silencing editors who have made charges against the holders of public office. The writer of this review has had ample occasions to know the extent to which those in authority will punish effective critics if they have the power so to do. If a time ever comes when fascism, communism, or any other revolt against free government becomes a possibility, much will depend on the steadiness with which interest in our principles has been maintained.

The single instance of newspaper depravity that is brought up most often is the Hall-Mills case. "Even the *Times* printed endless columns about it," the shocked ones exclaim. Why not? I wished to read the fullest and most accurate reports of the testimony, and so did my friends. The *Times* is voluminous, and nobody was compelled to read those columns. Of course there is a press for morons, but there are a great many morons, most of them have been taught to read, and there is no movement for a censorship conducted by a band of high-brows that will keep moron food out of the moron papers. The rule is sure to work in both directions. If we could have mere emptiness and vulgarity kept out of our newspapers by law the ground would be taken from under our feet in cases like the monkey law of Tennessee. Indecency, of course, whether in picture or text, is another matter, and requires not censorship but firm punishment in gross cases of coarse commercialism in sales to the young. It is easier to draw the line sensibly than to put the distinction into words: the rule should be to let anything alone about which there is any reasonable difference of opinion.

This handbook is well-made. Both sides of the subject are represented by intelligent extracts, and the mind of the reader is led to dwell on the subject in its historical and also in its immediate aspects. Obviously a varied collection of arguments and citation on this topic is useful to the person engaged in current controversy, but it is also a wholesome and interesting volume to have around the house.

New York City. NORMAN HAPGOOD.

International Communications: The American Attitude. By Keith Clark. 1931. New York: Columbia University Press. Pp. 261.—This book is a recognition of the growing importance of international legislation. To the author "there is something epical about international communication"; it "chants the story of mankind." She traces, in something more than outline, the history of such legislation with respect to posts, telegraphs, submarine cables, and radio-telegraph, and summarizes the position taken by the Government of the United States with respect to each. Since the suggestion by Postmaster-General Blair, in 1862, that a conference of postal authorities of Europe and America should be held, our Government has played a prominent role in the league of nations known as the Universal Postal Union, and the story told by Miss Clark should be read by all Americans who are addressing themselves to the problems of current international organizations. The United States is not a member of the International Telegraphic Union, owing at least partly to the private ownership of our telegraphs, though it has been represented at some of the conferences, notably the Paris Conference of 1925. In legislation concerning submarine cables and radio-telegraphic communications, the United States has always played a part. Miss Clark gives an interesting account of the various international conferences on these subjects, and traces the development of each subject through recent years. Much of her material is not readily accessible elsewhere. Each chapter is followed by a list of American representatives at the conferences. The study is a useful one both to the student and to the general reader, and it is to be hoped that it will inspire more detailed studies of international cooperation in this field.

MANLEY O. HUDSON.

Minimizing Taxes. By Jay M. Lee. 1931. Kansas City: Vernon Law Book Company. Pp. xiii, 1293. —To those who have occasion to use an outline of the taxing laws of the various states and of the Federal Government, this book affords a good bird's-eye view. With such a broad scope, detailed treatment as to any of these jurisdictions is impossible in a volume of this size. Thus, of nearly 1300 pages, 17 pages are devoted to Illinois, 54 to New York, 18 to Ohio, 15 to California, 178 to the Federal income tax law and 35 to the Federal estate tax law. This necessary brevity of treatment may be illustrated by comparing the 178 pages devoted to the Federal income tax with the 344 pages of the current Federal income tax regulations or the more than 1700 pages of text in Klein's "Federal Income Taxation." The volume does not undertake to make comprehensive suggestions as to ways in which taxes may be minimized, nor, except as regards a few situations, to compare the tax effects of different procedures. In the income tax discussion, very few Bureau regulations are cited and the references to the decisions of the Tax Board are few. Regarding the so-called reorganization provisions of the Federal law, there is not much more than a restatement of the text of the law itself.

Such a compendium is not, of course, to be relied on for final judgment, but it will nevertheless be useful, especially to those who are interested in the effect of domicile on the tax liability of an individual or a corporation, and to legislative draftsmen.

The book speaks, in the main, as of the fall of 1930. In using it, as in using any other text, it is necessary to be on the lookout for changes of law, regulation, or court precedent. For instance, the Joint Resolution enacted in March, 1931, changing the Federal estate tax law concerning gifts intended to take effect in possession or enjoyment at or after death, has rendered obsolete many of the statements on page 96, *et seq.*, of the book.

It would be a heavy task to make a real check of the accuracy of the summaries of state tax laws; in general, they seem correct, but no mention has been found, in the Indiana section, of the Indiana chain store tax, so-called, enacted in 1929 and held constitutional in *State Board* v. *Jackson,* United States Supreme Court, May 18, 1931.

In the synopses of state tax laws, to which the greater part of the book is devoted, the author has made comparison easy by adopting uniformly numbered headings.

ROBERT N. MILLER.

Washington, D. C.

Zoning in the United States. May, 1931, number (vol. 155, part II) of the Annals of the American Academy of Political and Social Science. 1931. Philadelphia: The American Academy of Political and Social Science. Pp. iv, 230.—This is a group of twenty-six essays on zoning. They are classified under four heads: Historical and Legal Aspects, Procedure of Zoning, Economics and Zoning, and General. There is an excellent bibliography prepared by Catherine McNamara, Librarian of the Harvard School of City Planning. The editor is W. L. Pollard, a Los Angeles lawyer with special experience in zoning and city planning law. He assigned about half of the articles to California and the other half to the East, and himself wrote the main article dealing with the law of zoning.

Both in his own article and in several others, the nuisance concept constantly recurs as the predominant basis of zoning; by which is meant the treatment of zoning regulation as merely an elaborate form of suppression or abatement of land uses and enterprises harmful to their neighborhoods, particularly residential neighborhoods. When this concept is applied in practice, the eye and mind of the zoner are concentrated upon the neighborhood, and the zone plan or ordinance tends to be a collection or aggregation of neighborhood adjustments and solutions. Furthermore, this concept leads to emphasis upon the past rather than the future; namely, to protection of things as they are.

Undoubtedly much of the impetus towards zoning came from dissatisfaction with the growing invasions of residential neighborhoods by non-residential uses, such as garages and filling stations. Probably popular support of zoning still come predominantly from vicinity zeal against these non-residential neighbors. The law reflected this origin and support, and judicial decisions acquired much of the terminology and outlook of the law of nuisances. As Mr. Pollard shows, this origin and the early legal development occurred in California, arising there out of the campaign against the Chinese, with the Chinese laundry as the original object of attack.

The law of zoning, however, as well as zoning practice, has outgrown, or, more accurately, is outgrowing this concept. Zoning is now recognized as a phase of constructive city and regional planning. Its method and justification derive from the principle that a zoning ordinance represents a scheme or plan for the distribution and allotment of land uses and develop-

ments in the whole zoned area, by means of which the health, safety, convenience, morals, prosperity and welfare of the people of that area will be furthered. In the application of this planning, as distinguished from the nuisance, concept, the unit which the zoner keeps in mind is the whole area, not merely the neighborhood; and his purpose is not so much the protection of existing neighborhoods from new uses, as it is the control of the future development of the whole area in accordance with an organic plan for the whole area. The plan is carried out by means of prohibitions and restrictions, as, for instance, the exclusion of stores from residential areas; but restriction is the instrumentality, not the goal.

To fling the ugly word "nuisance" at an attractive, neat little drug or grocery store, takes all definite meaning out of the word as a separate or special field of legislation. Zoning is, of course, applied to developed neighborhoods and not merely to raw and newly developing land, and adjustment must be made with the mistakes of the past and with neighborhood pressures and desires. Zoning as practiced and judicial decisions are a mixture of the two ideas or bases, and neither the pure nuisance or restrictive principle nor the pure planning principle has gained complete mastery in either law or practice. More and more, however, the courts have come to realize the planning concept as the correct basis of the validity of zoning, and the California courts themselves have become foremost in this recognition. The opinion of the United States Supreme Court in the *Euclid Village case* (272 U. S. 365) does not cite the Chinese laundry cases. In a recent California case, *Jones v. City of Los Angeles* (295 Pac. 214), the court sharply differentiates nuisance cases, such as the laundry cases, from zoning cases, and expressly stated that *Hadacheck v. Sebastian* (239 U. S. 394), originally hailed as the zoning pioneer, does not belong to that category. Mr. Pollard may be said to have over-emphasized both the influence and the continued prevalence of the restrictive or nuisance concept, and hardly gives adequate recognition to the growing authoritativeness of the planning concept.

The twenty-six essays deal with many phases of zoning. The California editorship is reflected in the fact of the small attention given to the zoning board of appeals, a device which California communities have not generally adopted. The appropriate scope of the jurisdiction of such boards, their procedure, and the definition of the principles which should govern their decisions, present difficult and pressing problems which have not been covered in this particular compilation.

Every one of these essays contains something of interest; each of them is well worth reading, both by those familiar with zoning experience and those for whom the field is still novel. Space permits of only a few words about points raised in a few of them. Mr. Pollard's article stresses that industries in industrial zones should receive more protection from attack by neighboring residents than the courts have as yet afforded. Frederic A. Delano, in the article on "Zoning Laws and Their Relation to Taxation," suggests that taxes should "bear a fair relation to the use for which property is zoned." Where, in practice, this harmony is not obtained, may not the cause be that there either the zone plan or the tax administration is not of high quality? In "Zoning by Design," by Charles H. Diggs, Director of The Regional Planning Commission of Los Angeles County, the author assumes the negative or nuisance concept of zoning to prevail, and proceeds to urge that through planning, or, as he terms it, design, rather than through legal restrictions, the desired stabilizing effects be accomplished. There could be no disagreement with this emphasis upon the importance and possibilities of zoning by design; but one is surprised that the thought is presented as something novel and needing to be pressed, for some of us had assumed that the planners had always relied upon careful design, rather than law, as the main stabilizer of values and uses. Mr. Diggs seems to assume that zoning by design is applicable to raw and undeveloped land exclusively. Admission of this would take a good many of the legal and moral props from under the zoning of cities.

In the article on "State Zoning" C. B. Whitnall assumes that zoning has been entirely restrictive and prohibitive in purpose, and demonstrates that zoning should be constructive planning for the conservation of resources, and that its principles are applicable to whole states as well as to smaller political subdivisions. In "Business Zoning" Harland Bartholomew gives a clear statement of the reasons for and the bad effects of the excessive number and size of business zones. In "Zoning, Taxation and Assessments," Donald M. Baker, of Los Angeles, realizes that valuation and special assessments should bear some harmonious relation to the zone plan, though he does not carry the idea through to all its implications and possibilities. In "Aesthetics of Zoning," Russell Van Nest Black points out the need of developing stateable zoning principles. In "A Realtor's Viewpoint on Zoning, Present and Future," Harry H. Culver, a realtor of Los Angeles, gives a splendid statement of the progressive realtor's point of view. He seems, however, to commit the fallacy of treating economic prosperity as something so separate from the health, safety, convenience and welfare of the community that one could promote the latter benefits while destroying the former or successfully promote the former while disregarding the latter.

Naturally, twenty-six essays vary in quality. Amongst those outstanding by reason of clear statement of fundamental principles or of original thought may be mentioned: "The Effect of Zoning on the Investment in Public Works," by W. W. Horner, Municipal Engineer of St. Louis, containing an exceptionally succinct and clear presentation of the relation of zoning to the location of public works; John M. Gries' "The City Plan and What It is," a clear and comprehensive statement of the elements and purposes of city planning, but which places an excessive reliance upon the constitutionality of zoning in general, failing to realize that any zoning ordinance in particular may be destroyed by chipping it away through variations here and there or decisions invalidating this or that detail; "Progress in the Science of Zoning," by Jacob L. Crane, Jr., of Chicago, a good presentation of the need for the development of basic zoning standards and principles, with a fine summary of recent experimentations; Professor William B. Munro's "A Danger Spot in the Zoning Movement," which gives us a much needed warning that the promotion of public health, convenience, prosperity, safety, morals and welfare, and not, as so often stated, the stabilization of property values, is the end and purpose of zoning; though, in treating the stabilization of values as a mere incident of the process of planning, Mr. Munro fails to recognize it as an instrumentality or means for the accomplishment of that public welfare which planning, including zoning, is intended to promote; and, finally, the most brilliant of the essays, that of Hugh R. Pomeroy, of Los Angeles, entitled "County Zoning

Under the California Planning Act," which is so full of profoundly true realizations of the purposes and the methods of zoning, that the only adequate way to review it would be to quote it in full. Mr. Pomeroy shows why the less developed areas are those in which zoning has the best chance to effect its purposes; that the best time to zone is at or before the time of subdivision for urban uses; that, indeed, the principles of zoning apply to rural, as well as urban, districts, and that the whole region or metropolitan area, rather than the central urbanized area alone, is the true unit. It may be remembered that in the Euclid Village case, the Supreme Court of the United States discarded the region as the unit and held that the village may devise its zone plan as though it were the whole unit to be considered, and that at the time some of us pointed this out as a theory which would not hold in the long run.

ALFRED BETTMAN.

Cincinnati, O.

Social Control of Sex Expression. By Geoffrey May. 1931. New York: William Morrow & Co. Pp. viii, 307.—Both law and sociology are served with distinction when a capable legal scholar possesses such a strong social flair as Mr. May has displayed in his studies of the administration of the law of domestic relations. His latest work is this study of control exercised by Anglo-American law over voluntary sex expression. He seeks through his legal and historical research to bring out some of the specific reasons for the conclusion that "for the greater part of the period of the last six hundred years the history of the control of sex expression in England and America has been the history of administrative failures."

The two salient facts which Mr. May seems to discover in this review of nearly ten centuries of more or less earnest effort on the part of church and state to control sex life are first, that the methods of legal control of sex expression have varied widely throughout Anglo-American history; but, second, that the attitude behind the law, the doctrine of sex morality itself, has varied not at all. Although he finds that male chastity was exceptional among the Israelites and that from the Roman period onward has not been any too prevalent amongst English-speaking people, nevertheless the essential basis of English law on the subject of sex is the doctrine of chastity developed by the early Christian fathers out of the customs of primitive peoples and as embodied in ancient Hebrew law.

If the question be raised, Why has this body of law sought so zealously to maintain a doctrine apparently so remote from elementary human nature? the answer is two-fold. First, the emotional reaction of the early Christian church against contemporary sexual looseness; and second, the more or less unconscious crystallization in the *mores* of the idea that society conceives itself to be suffering the loss of potential strength through "voluntary non-marital sex expression." The author is on the soundest of sociological ground when he points out that in spite of administrative failures the laws seeking to restrain promiscuous sex expression served a real purpose in integrating and maintaining family relationships at a time when family organization needed backing, and that though the forms of control have changed, the fact of control itself, however less tangible, still persists.

In the working out of his historical problem Mr. May covers a wide range of ecclesiastical and secular history. He reviews the long contest between church and state for the control of domestic relations, and traces jurisdictional disputes between them to ambiguous pronouncements by church fathers and by secular rulers like William the Conqueror. He rehearses the familiar story of ecclesiastical corruption in sex matters during the middle ages. But he does not rest his judgment upon mere traditional hearsay: he proves his case from contemporary court records. While the author perceives sympathetically the difficulty of handling such a recalcitrant problem as sex, nevertheless he is not reticent in analyzing the sources of ecclesiastical ineptitude. In general it may be said that the administration of sex relations by ecclesiastical courts broke down through two weaknesses, namely, system and personnel. The system of punishment by money fines led almost inevitably to corruption and "a corrupt personnel took advantage of the weakness of a deficient system." The penitentials degenerated into cheap indulgences. "Snooping," gossip and bribery brought the whole system of ecclesiastical control into contempt. Apparently the "racket" is no twentieth century American invention, for sex racketeering was rampant in the fifteenth century. Its scandals are embodied in many contemporary documents.

Nor is the history of secular attempts at control, as May analyzes them, much more edifying. At times the secular authorities cooperated with and reenforced the ecclesiastical agencies, at times competed with them or even opposed them. Originally the secular control was purely local. Later in England it became part of the common law and was vested in the crown. But such spectacular attempts at control as the famous High Commission and the brief regime of the Puritans were such disastrous failures that they tended to create a suspicion as to the wisdom of attempting legal control over anything except the most outrageous forms of sexual divagations. Hence the author's finding that the law of England does not venture to intrude upon private and voluntary sex expression except in such cases as open and notorious lewdness, bestiality or incest. The English secular and clerical law and tradition lingered on in the American colonies much longer than in the mother country. But Mr. May concludes that the Puritan tradition as to sex expression is in practice and social outlook really just as obsolescent or dying in America as in England. Yet the old forms survived. Therefore, one may still talk at least in theory of the "legal control in America of voluntary sex expression."

In this as in previous studies Mr. May reveals himself as a careful scholar, learned in the law, conscientious in checking his source materials. He informs his style with an occasional glint of sly humor not unknown amongst lawyers.

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Signed Articles

As one object of the AMERICAN BAR ASSOCIATION JOURNAL is to afford a forum for the free expression of members of the bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of this JOURNAL assume no responsibility for the opinions in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention.

Leading Articles from Current Legal Periodicals

Illinois Law Review, November (Chicago)—Injunctions Against Crime, by Harmon Caldwell; Restatement of the Law of Contracts—Illinois Annotations, by Harold W. Holt; Interstate Compacts as the Solution for Lack of State Power, by John H. Wigmore.

Illinois Law Review, December (Chicago)—United States vs. Macintosh—A Symposium, by John H. Wigmore, Kenneth C. Sears, Ernst Freund, Frederick Green; Effect of Foreign Divorce Upon Dower and Similar Property Interests, by Fowler V. Harper.

Law Quarterly Review, October (Toronto)—Tort Liability and the Conflict of Laws, by Prof. Ernst G. Lorenzen; Law Teaching and Law Practice, by A. E. W. Hazel; Assignments of Debts in England from the Twelfth to the Twentieth Century, by S. J. Bailey; The Basilica: II by F. H. Lawson; The Observance of Law as a Condition of Jurisdiction: II, by D. M. Gordon.

Michigan State Bar Journal, November (Ann Arbor, Mich.)—Proceedings of the Forty-first Annual Meeting; The National Conference of Bar Examiners; Comments on the Reports of the National Commission on Law Observance and Enforcement; State Juvenile Court Procedure for Federal Juvenile Offenders, by Howard E. Wahrenbrock.

American Journal of International Law, October (Washington, D. C.)—Prize Law and Modern Conditions, by Thomas Baty; Railway Politics and the Open Door in China, 1916-1917, by Paul Hibbert Clyde; The Turkish-American Controversy over Nationality, by Leland J. Gordon; National Judges in the Permanent Court of International Justice, by Norman L. Hill; The International Technical Consulting Committee on Radio Communications, by Irvin Stewart; Diplomatic Privileges and Immunities of Agents Invested with Functions of an International Interest, by Lawrence Preuss.

Journal of Air Law, October (Chicago)—The International Aviation Policy of the United States, by Kenneth Colegrove; Aerial Bombardment of Civil and Military Objectives, by Frank E. Quindry; The Present Status and Development of Aviation Law, by George B. Logan; A Survey of Aviation Insurance Law, by Kurt J. Kremlick.

Iowa Law Review, November (Iowa City, Ia.)—Government Bonds and Private Promises under Unconstitutional Statutes, by Oliver P. Field; Commentary on Recent Iowa Legislation Affecting Courts, Procedure, and Practice, by Mason Ladd; The Use of Martial Law to Regulate the Economic Welfare of the State and Its Citizens: A Recent Instance, by Garrett Logan; Proposed Integration of the Bar in Iowa, by Paul L. Sayre.

Kentucky Law Journal, November (Lexington, Ky.)—Conflict of Decisions Between State and Federal Courts in Kentucky and the Remedy, by Charles I. Dawson; Extra-Constitutional Government, by Edwin F. Albertsworth; Public Purpose in Taxation and Eminent Domain, by Julius R. Bell; The Use of the Injunction to Prevent Crime, by Gordon Finley; Constitutional Limitations on Public Indebtedness, by Richard Priest Dietzman.

Journal of Criminal Law and Criminology, September (Chicago)—Honoring Human Nature in Prisons; The French Court of Assizes, by Damon C. Woods; The Basis of a Crime Index, by Thorsten Sellin; Criminal Statistics and the National Commission's Report, by Audrey M. Davies; Parole Procedure in New Jersey, by Winthrop D. Lane; The Consistency of Testimonial Accuracy, by Alfred Kuraner; Foreign Observations and Comments, by E. R. Cass; A Sheriff Tries Crime Prevention, by Gerald Cress.

California Law Review, September (Berkeley, Cal.)—The Modern Problem of the Nature of the Wife's Interest in Community Property—A Comparative Study, by Harriet S. Daggett; Comments on the Probate Code of California, by Perry Evans.

California Law Review, November (Berkeley, Calif.)—Waiver and Estoppel in Insurance Law in California, by Stephen I. Langmaid; The Split Session of the California Legislature, by Thomas S. Barclay.

United States Law Review, October (New York City)—Corporate Fiduciaries and the Bar, by Merrel P. Callaway.

United States Law Review, November (New York City)—Fundamentalism and the Law, by Frank Swancara; Hearsay Evidence Received Without Objection; Effect on Lease of Bankruptcy of Tenant, by Clarence M. Lewis.

Mississippi Law Journal, November (University, Miss.)—The Federal Employers' Liability Act, by Ellis B. Cooper; Our $70,000,000 Experiment, by J. N. Flowers; Banks and Banking—Insolvency—Preferred Claims, by S. E. Travis; Some Observations on Statutory Rule Against Perpetuities, by J. E. Holmes; Some Simple Improvements in Practice, by Julian C. Wilson.

American Journal of Police Science, July-August (Chicago). The Bureau of Investigation of the American Medical Association, by Dr. Arthur J. Cramp; The Story of Ink, by Charles C. Pines; The Science of Fingerprint Identification; Finger Patterns, by Louis Herrman; The Missile and the Weapon, by Dr. A. L. Hall; Science Versus Practical Common Sense in Crime Detection, by Al Dunlap; The Use of Scopolamine in Criminology, by Dr. Robert E. House; Wickersham Report on Police; Courses for Policemen at the University of Southern California, by Bates Booth; Fall Course in Methods of Scientific Crime Detection.

Yale Law Journal, November (New Haven, Conn.)—The Social Thought of Mr. Justice Brandeis, by Max Lerner; Legal Planning of Petroleum Production, by J. Howard Marshall and Norman L. Meyers; The Practice of Law by Laymen and Lay Agencies, by Frederick C. Hicks and Elliot R. Katz.

Virginia Law Review, November (University, Va.)—The Supreme Court and State Police Power, 1922-1930, by Thomas Reed Powell; Concerning Mergers and Sales of Entire Corporate Assets, by Villard Martin; Public Purpose in Taxation and Eminent Domain, by Julius Raymond Bell.

Columbia Law Review, November (Brattleboro, Vt.)—Mr. Justice Brandeis, by Hon. Charles E. Hughes; The Jurist's Art, by Walton H. Hamilton; The Industrial Liberalism of Justice Brandeis, by Donald R. Richberg; Theorems in Anglo-American Labor Law, by George H. Jaffin.

Canadian Bar Review, October (Toronto)—Presidential Address, by Louis S. Laurent; The Declaratory Judgment, by Paul Martin; Three Views of Constitutional Law, by W. P. M. Kennedy; The Ontario Land Titles Act as Affected by the Bankruptcy Act, by F. A. Magee.

Canadian Bar Review, November (Toronto)—The Legal Position of the Child of Unmarried Parents, by Frederick Read; Political Heritage of English-Speaking America, by Honorable W. D. Herridge; Mortgage Clause in Fire Insurance Policies, by A. C. Heighington; Death Taxes in Manitoba, by Harold Douglas Barbour; The Right Honorable Charles J. Doherty: An Appreciation, by Honorable P. B. Mignault; Henry O'Brien, K. C., An Appreciation, by The Editor.

University of Pennsylvania Law Review, November (Philadelphia, Pa.)—Austin Tappan Wright, by William H. Lloyd; State Compacts as a Method of Settling Problems Common to Several States, by William J. Donovan; Are Judges Human? by Jerome Frank; Judicially Non-Enforcible Provisions of Constitutions, by Walter F. Dodd.

The Journal of Radio Law, October (Chicago)—Censorship of Radio Programs, by Edward C. Caldwell; State Taxation of Radio Communication, by Bernard G. Bechhoefer; The Legal Basis for Broadcasting in Germany, by Dr. Willy Hoffmann; The Regulation of Television, by H. M. Smith.

Georgetown Law Journal, November (Washington, D. C.)—Lex Christiana, Part I, by Charles Sumner Lobingier; Diplomatic Privileges and Immunities in International Organizations, by Norman L. Hill; The Advisory Opinion Concerning the Austro-German Protocol for the Establishment of a Customs Union, by Lewis C. Cassidy.

Harvard Law Review, November (Cambridge, Mass.)—To Mr. Justice Brandeis on his Seventy-fifth Birthday—Elmer Balogh, Henry Wolf Biklé and Felix Frankfurter; Ethics in English Case Law, by Percy H. Winfield; The Ideal Element in American Judicial Decision, by Roscoe Pound.

Law Notes, October (Northport, N. Y.)—Betting on Result as Disqualifying Juror, or as Ground for New Trial, by Carl V. Venters; What is a "Book?" by C. S. Wheatley, Jr.; Superstition and the Mails, by Berto Rogers.

Law Notes, November (Northport, N. Y.)—Emergency as Obviating Necessity of Obtaining Patient's Consent to Operation, by Harry Rockwell; Dissenting Opinions, by Berto Rogers; The Hazards of Golf, by Joseph T. Buxton, Jr.

Washington Letter

1266 National Press Bldg.
Washington, D. C.
December 8, 1931.

Annual Report of the Attorney General of the United States

THE operations of the Department of Justice are fully described in reports of the chiefs of divisions and bureaus, attached to the Attorney General's report to Congress dated December 7, 1931. In making recommendations for additional legislation the Attorney General states: "Mindful of the fact that the next Congress will be called upon to deal with many subjects of national importance, I feel obliged to limit my recommendations for legislation to a few matters of special importance to which it is hoped favorable consideration can be given, and to refrain from recommendations of so controversial a nature as to give no prospect of passage."

In recommending bankruptcy legislation, the Attorney General states that "The present bankruptcy law has failed to achieve its purposes." He calls attention to an exhaustive investigation which has been conducted into the operations of the bankruptcy law and a report which will shortly be submitted to the President, at whose direction the investigation was undertaken. The conclusions reached as a result of this inquiry have been embodied in proposed amendments to the existing bankruptcy law. "These proposals," says the Attorney General, "deserve the earnest consideration of the Congress."

The second recommendation has to do with appellate criminal procedure, which, according to the Attorney General, should be thoroughly overhauled, as the present system permits inexcusable delays and unnecessary expense. He states that to prescribe rules of procedure necessary in the District and Circuit Courts of Appeal by statute is not a good solution, because statutory rules are too rigid and are not open to prompt revision if found ineffective. "The wise course is to authorize the Supreme Court of the United States to prescribe a uniform set of rules of practice and procedure in criminal cases in respect of all proceedings after verdicts in the District Court and in the Circuit Courts of Appeal. That court has put an end to delays in criminal cases brought before it, and it may be expected to adopt rules to produce like results in the lower Federal Courts."

"Legislation should be enacted permitting an accused to waive the requirement of an indictment by a grand jury. Where the accused intends to plead guilty, preliminary hearings and grand jury proceedings are needless for his protection and cause unnecessary expense and delay. In such cases the law should permit the filing of an information and immediate plea and sentence. Such a system will tend to speed up the disposition of criminal cases. The recent decision of the Supreme Court of the United States respecting waiver by the accused of the right to trial by petit jury, and the recent recommendation by the Judicial Conference respecting this matter, give ground to believe that there is no valid constitutional objection to this proposal."

With respect to the invalidity of indictments through disqualification of grand jurors, the Attorney General says that "legislation should be adopted applicable to the United States District Courts, including the Supreme Court of the District of Columbia, to the effect that indictments shall not be invalidated because of the presence of ineligible grand jurors, if not less than twelve eligible jurors vote for the indictment. A rule which would require disclosure of grand jury proceedings would be objectionable, but this proposal could be applied in practice by disclosure of nothing more than the number of grand jurors voting for the indictment. Supplementing this proposal, legislation should be adopted limiting the time for making motions to quash indictments because of disqualifications of grand jurors."

The Attorney General recommends legislation applicable to the Supreme Court of the District of Columbia, revising the present law respecting the qualifications of grand and petty jurymen, and legislation for additional judges for United States District Courts and Circuit Courts of Appeal, in accordance with the recommendations of the Judicial Conference on this subject. The report of the Judicial Conference, in full text, is embodied in the Attorney General's report.

Solicitor General's Report

The Solicitor General, in his report calls attention to the progress which the Supreme Court of the United States has made in clearing its appellate docket and in the prompt dispatch of current business since the enactment of the judiciary act of February 13, 1925, which enlarged the court's discretionary, as compared with its compulsory or obligatory, jurisdiction.

In referring to the business of the Government in the Supreme Court, the Solicitor General states that "One of the aims of the Solicitor General's office has been not to burden the Supreme Court with useless appeals and applications for certiorari. Of the total of 726 petitions for certiorari disposed of at the last term, 567, or 78 per cent, were denied or dismissed, and only 22 per cent were granted. Separating the petitions for certiorari in Government cases from those in non-Government cases, it appears that in all but 3.7 per cent of the cases in which the Government opposed certiorari the petition was denied. Seventy-seven per cent of the petitions in which the Government was petitioner were granted, or almost four times as many as the general average."

Quo Warranto Proceedings Against Chairman of Federal Power Commission

On December 5, 1931, Associate Justice Gordon, of the Supreme Court of the District of Columbia, in a lengthy opinion, held that the petition filed by the United States Attorney for the District of Columbia, praying that a writ of quo warranto issue against George Otis Smith, requiring him to show by what warrant he held or exercised the office of member and Chairman of the Federal Power Commission, should be denied.

On December 3, 1930, the President transmitted to the Senate the nomination of George Otis Smith

to be a member of the Federal Power Commission for a term expiring June 22, 1935. The Senate on December 20, 1930, in open executive session and by a vote of 38 to 22, advised and consented to the appointment, and on the same day it was ordered that the resolution of confirmation be forwarded forthwith to the President. Upon the announcement of the result of the vote, the President Pro Tempore stated: "The Senate advises and consents to the nomination and the President will be notified."

No objection being made or further proceedings having been had, the following was entered by the Secretary of the Senate upon the Executive Journal of the Senate for that date, to wit: "Ordered, that the foregoing resolution of confirmation be forwarded to the President of the United States."

Further proceedings having been had that day in said executive session with reference to nominations then pending before it, there was in like manner entered upon said Journal the following order, to-wit: "Ordered, that all resolutions of confirmation this day agreed to be forwarded forthwith to the President of the United States."

This action was officially transmitted to the President by the Secretary of the Senate on December 22nd, and on that same date the President issued and delivered to Mr. Smith a communication purporting to appoint him a member and Chairman of the Federal Power Commission.

The Senate adjourned on December 20th until January 5, 1931, which latter date was the next day of actual executive session of the Senate after the confirmation. On January 5th a motion was made to reconsider as well as a motion to request the President to return the resolution of confirmation and both motions were adopted on January 9th. The President declined to do so, and so advised the Senate January 10th. The Senate thereafter adopted a motion to place the nomination on the Executive Calendar, and on February 4, 1931 the Senate voted not to confirm, of which action the President was duly advised.

On February 5th the Senate by resolution ordered the filing of the suit in which Justice Gordon rendered the opinion.

The sole question for the determination of the court was one of law, namely, was Mr. Smith appointed by the President by and with the advice and consent of the Senate, or did the Senate, in strict conformity with its rules, refuse that advice and consent?

After reviewing the rules and precedents of the Senate, Mr. Justice Gordon held that "constitutional theory, parliamentary usage, Senate Rules, Senate precedents and considerations of practical procedure alike lead to the conclusion in the instant case that when the Senate, in conformity with its own rules, unanimously ordered notice of consent to be sent to the President, it once for all surrendered its control of the matter and its right to reconsideration and left the Executive free to make a constitutional appointment. When a commission was signed and sealed and irrespective of the steps taken by the appointee to qualify, the President conferred upon him title to the office in question and of it he cannot be deprived unless removed by the President according to law."

The general rule in a parliamentary body, according to the decision, is that a motion to reconsider comes too late if the body has parted with the possession and control of the subject matter. The Senate had a right to retain possession, but if this was parted with, reconsideration was no longer possible. After an appointment is made by the President upon notification by the Senate of its confirmation of a nominee, the President is without authority to restore control to the Senate by a return of the resolution of notification.

Prior to April, 1867, irrespective of the limited period during which the Senate could reconsider, its power to do so was ipso facto lost once the resolution announcing its decision had gone out of its possession. In other words, the transmission of the resolution of notification was the controlling factor. The amendment to the rules of April 6, 1867 made the letter of the rule conform to pre-existing usage by excepting nomination cases from the flat declaration that reconsideration was always out of order after loss of possession, and added the proviso that, in nomination cases, after notification to the President, the motion to reconsider must be accompanied by a request for return. By the earlier rule the Secretary of the Senate had been instructed to return to the President "from day to day" all nominations as soon as action upon them had been taken. By the amendment of 1867, this instruction was so changed that the Secretary was to notify the President "on the next day after such action is had," with the added proviso, however, "unless otherwise ordered by the Senate." A further amendment in 1868 extended the time for notification to the President to the expiration of the time limited for making a motion to reconsider, i.e., the two next days of actual session, but with the same proviso.

The amendment of 1877 was to the effect that after possession had been parted with, a motion to reconsider must be accompanied by a motion of request for return. "This amendment," says Justice Gordon, "strengthens the view that a compliance with the request for return must precede a vote on the motion to reconsider." This amendment only affected nominations by extending the time for notification to "the next two days of actual executive session," reserving the right, however, to notify the President sooner.

"The principle of possession as necessary to effective reconsideration is still recognized by the provision for a request for return of notification. The time within which the Senate must make up its mind whether or not to treat a vote of confirmation as final is still two days of actual executive session. The right within that time to part with possession by notification to the President is still preserved. In short, the Senate Rule in its present form indicates no departure whatever from the theory which inspired the very earliest rule—namely, that parliamentary reconsideration is impossible unless the subject-matter is still within the Senate's possession."

Senator Walsh of Montana stated orally after the decision was announced that an appeal would be taken.

Seventy-Second Congress

Congress convened on December 7th, and on the 8th five thousand and fifty-nine bills were introduced in the House of Representatives. No bills were introduced in the Senate until the 9th, when more than one thousand were introduced.

Among those introduced in the House of Representatives on December 8th, relating to the Judiciary, are the following:

H.R. 90. Mr. Bacharach. To supplement and amend an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary" (Act of March 3, 1911, chapter 231), and known as the Judicial Code, and to limit the jurisdiction of district and circuit courts in certain cases.

H.R. 103. Mr. Cochran. To enforce the fourth and fifth amendments to the Constitution of the United States, and for other purposes.

H.R. 105. Mr. Cochran. To provide that certain officers and employees of the United States shall file bonds for the purpose of satisfying judgments obtained by persons injured by the unlawful or careless use of firearms by such officers or employees, and for other purposes.

H.R. 242. Mr. Celler. To amend the bankruptcy law.

H.R. 250. Mr. Celler. To fix salaries of certain judges.

H.R. 252. Mr. Celler. To amend section 283 of the Judicial Code. This bill amends Section 283 of the Judicial Code (Section 420, Title 28, Code of Laws of the U. S.) by adding the following:

"No hearsay, incompetent, or illegal testimony of witnesses shall be received by the grand jury. Stenographic record shall be made and kept of all testimony and same shall be transcribed and shall be open to inspection of any person or corporation against whom any indictment, based upon such testimony, is found, upon order issued by the district court. Such order for inspection shall be issued only upon good cause shown that hearsay, incompetent, or illegal testimony was received by the grand jury, and that the indictment was founded thereupon. The district court may grant a motion to dismiss the indictment if founded upon hearsay, incompetent and illegal testimony. The district court, in its discretion, shall have the right to examine said minutes without permitting the inspection by any defendant, and if satisfied that the indictment was founded upon hearsay, incompetent, or illegal testimony, shall have the right to dismiss the said indictment."

H.R. 255. Christopherson. To establish uniform requirements affecting government contracts.

H.R. 259. Mr. Colton. To amend the Criminal Code of the United States.

H.R. 275. Mr. Fitzpatrick. For the trial of Federal or State officers, agents, or employees in the Federal courts for violation of the provisions of the fourth amendment to the Constitution of the United States.

H.R. 276. Mr. Fitzpatrick. Transferring trials of Federal officers, agents, or employees of the United States Government from Federal to State jurisdiction.

H.R. 300. Mr. Houston. To amend section 319 of the act to codify, revise, and amend penal laws of the United States.

H.R. 322. Mr. Knutson. For more expeditious settlement of money claims against the United States. This bill would refer all money claims submitted in Congress to the General Accounting Office for examination and settlement on principles of equity and justice.

H.R. 336. A bill by Mr. LaGuardia, identical with H.R. 90, referred to above.

H.R. 342. Mr. LaGuardia. A bill defining combinations and conspiracies in trade and labor disputes and prohibiting the issuance of injunctions therein.

H.R. 345. Mr. LaGuardia. A bill to amend section 380 of title 28 of the United States Code (Judicial Code, section 266, amended).

H.R. 347. Mr. LaGuardia. A bill to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes.

H.R. 350. Mr. LaGuardia. A bill providing a trial by jury for acts constituting contempt of court.

H.R. 351. Mr. LaGuardia. A bill exempting newspaper men from testifying with respect to the sources of certain confidential information.

H.R. 374. Mr. Michener. A bill exempting building and loan associations from being adjudged involuntary bankrupts.

H.R. 376. Mr. Ramspeck. A bill to limit the time for bringing suit on bonds of clerks of United States district courts.

H.R. 377. Mr. Sanders. To amend title 28, section 41, of the United States Code.

H.R. 4498. Mr. Bachmann. To make permanent certain temporary judgeships.

H.R. 4500. Mr. Bachmann. To dispense with the necessity of setting out copies of instruments in indictments and informations.

H.R. 4501. Mr. Bachmann. To provide for references in law cases by consent of the parties and declaring the effect of such submission.

H.R. 4502. Mr. Bachmann. To provide that indictments and informations shall not be held sufficient for failure to lay the venue.

H.R. 4526. Mr. Bulwinkle. To amend subsection 1 of section 24 of the Judicial Code.

H.R. 4554. Mr. Free. To amend section 5 of the suits in admiralty act.

H.R. 4620. Mr. Michener. To authorize the registration of judgments, decrees, and orders rendered by any court of record of any State or of the United States in any other such court of record, and to prescribe the effect thereof.

H.R. 4624. Mr. Montague. To amend the Judicial Code by adding a new section to be numbered 274 D.

H.R. 4644. Mr. Sandlin. To amend and reenact section 762 of title 28 of the Code of Laws of the U. S., relative to suits against the United States.

H.R. 4645. Mr. Sandlin. Fixing the venue of suits against the United States for recovery of internal revenue taxes.

H.R. 23. Mr. Clancy. To prevent wire tapping.

S. 33. Senator King. To amend the Judicial Code by adding a new section, to be numbered 274 D. S. 495. Senator George. To limit the time for bringing suits on the bonds of clerks of United States District courts. S. 496. Senator George. To establish a retirement and disability service for court clerks. S. 497. Senator George. Relating to salaries of clerks of U. S. district courts. S. 933. Senator Norris. To amend Section 1025 of the Revised Statutes. S. 935. To amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes. S. 936. To abolish bailiffs and criers in the U. S. courts and to provide for the performance of their duties by U. S. marshals and their deputies and for other purposes. S. 937. To amend the first paragraph of Section 24 of the Judicial Code. S. 938. To amend Section 229 of the Judicial Code. S. 939. To limit the jurisdiction of district courts of the United States. S. 941. Relating to the review of cases tried in the district courts of the United States without a jury. By Senator Walsh of Montana—S. 1052, relating to pardons. S. 1054, relating to foreign judgments. S. 1055. To amend the Penal Code. S. 1056, granting immunity to certain witnesses. S. 1057. To further the administration of justice in the Federal courts.

AMERICAN AND GERMAN WAR CLAIMS SETTLED

Mixed Claims Commission, United States and Germany, Will During 1932 Conclude What Is Generally Recognized as the Greatest International Claims Arbitration in History — A Monumental Achievement — Statistics of Claims Disposed of — Return by United States of Sequestered German Property—Work of War Claims Arbiter Under Settlement of War Claims Act, Etc.

By Joseph Conrad Fehr*
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NECESSARILY it has taken some years to bring order out of the chaos which the World War left in its wake. The orderly processes of peaceful and amicable adjustment are infinitely slower than the destructive forces of war. The United States has reason to know this. The post-war period for the United States has been marked with several outstanding accomplishments, the result of championing the principle of arbitration as the most satisfactory solution of international differences. The most important is the Mixed Claims Commission, United States and Germany, which will during 1932 conclude what is generally recognized as the greatest international claims arbitration in history, a monumental achievement in the judicial settlement of controversies between nations.

Both the United States and Germany promptly organized the Commission, pursuant to their Agreement of August 10, 1922, following the Treaty of Berlin of August 25, 1921, which restored friendly relations. Before the end of 1922 the tribunal was preparing to pass upon the following categories of claims, defined in the Agreement:

"(1) Claims of American citizens, arising since July 31, 1914, in respect of damages to, or seizure of, their property, rights and interests, including any company or association in which they are interested, within German territory as it existed on August 1, 1914;

"(2) Other claims for loss or damage to which the United States or its nationals have been subjected with respect to injuries to persons or to property, rights and interests, including any company or association in which American nations are interested, since July 31, 1914 as a consequence of the war;

"(3) Debts owing to American citizens by the German Government or by German nationals."

On the suggestion of Germany that an American be named as Umpire, the Honorable William R. Day, then an Associate Justice of the Supreme Court of the United States, was designated by President Harding. Judge Edwin B. Parker, of Texas and New York, a distinguished lawyer, who during the war served as priorities commissioner on the War Industries Board and later as Chairman of the United States Liquidation Commission in Europe, which adjusted approximately $1,600,000,000 in claims between the United States and the Allied Powers, accepted appointment as American Commissioner. Germany named Dr. Wilhelm Kiesselbach, of Hamburg, an eminent German jurist, now serving also as President (Chief Justice) of the Hanseatic Supreme Court, as her representative on the Commission. Upon the resignation of Mr. Justice Day, shortly before his death in 1923, Judge Parker was the choice of both Governments for the position of Umpire. He was succeeded as American Commissioner by the Honorable Chandler P. Anderson, of New York and Washington, former Counselor of the Department of State, an outstanding specialist in international law who has frequently represented the United States in the deliberations of international arbitrations here and abroad. Following the death of Judge Parker in October, 1929, the Hon. Roland W. Boyden of Boston was on January 9, 1930, selected as Umpire. Mr. Boyden had been for several years the unofficial observer of the United States at the Reparation Commission in Paris. The sudden death of Mr. Boyden on October 25, 1931, left a vacancy not only in the post of Umpire but also in the United States panel of the Permanent Court of Arbitration under the old Hague conventions and in the presidency of the arbitration tribunal established under the Young Plan.

The Honorable Robert W. Bonynge, of New York, a prominent lawyer and former Representative in Congress from Colorado, has since June, 1923, been the American Agent in charge of the preparation and presentation of these claims before the Commission. He succeeded Robert C. Morris of New York, who resigned after the organization work was completed. He is assisted by a legal staff, with Mr. Harold H. Martin, of Washington, who has ably served the United States Government in various advisory capacities, as chief counsel.

The present German Agent is Dr. Wilhelm Tannenberg, who last spring succeeded Dr. Karl von Lewinski, a former high official in Germany's diplomatic service.

It was not the intention of the contracting parties that the Umpire serve as presiding officer. The practice of the Umpire presiding over meetings of the Commission was adopted when the late Judge Parker succeeded to the position of the Umpire upon Mr. Justice Day's resignation.

In less than nine years this tribunal and the two Agents representing the respective governments, together with their staffs of counsel, have disposed of nearly all of 20,425 claims. Germany was officially notified of the first group of claims, 12,416 in number, prior to April 10, 1923, as required under the rules adopted. In terms of dollars and cents the demands of these thousands of claimants, including the exaggerated or unfounded

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with the meritorious, reached the stupendous figure of $1,479,064,313.92. This included the claim for the cost of maintaining the American part of the Army of Occupation along the Rhine, estimated at $255,544,810.53 (as of January 31, 1923). This claim, by reason of the separate arrangement between the United States and Germany of June 23, 1930, in lieu of the Young Plan (which supersedes the Dawes Plan and the agreement adopted by the Paris conference January 14, 1925), is to be paid by Germany directly to the United States, hence was not pressed before the Commission. The reparation demands of the principal Allied and Associated Powers, it will be recalled, totaled about $32,000,000,000.

Subsequently, under the Agreement of December 31, 1928 (contemplated by the Settlement of War Claims Act of 1928), a large group of so-called late claims came within the jurisdiction of the Commission. These cases, 8,009 in number, have all been decided.

There are some 167 (including 157 sabotage) claims pending adjudication by the Commission. These remaining claims have been submitted for decision. It is estimated that when the work of the Commission shall have been completed the total bill against Germany will be approximately $300,000,000, including interest and including the sabotage claims. This means that the principal alone will amount to approximately $160,000,000, exclusive of the sabotage claims.

Of the 6,816 awards in private claims, the figures now definitely ascertained are, exclusive of interest, $2,409,431.31 in awards in the Lusitania group, $35,342,105.62 in the Marine Underwriters group, and $80,221,296.10 in the other claims, involving deaths and personal injuries (other than the Lusitania group), American hull and cargo losses, property losses in occupied territory, property losses in Germany, American interests in German estates, debts, bank deposits, and bonds. In addition, the estimated amount of the pending claims, exclusive of interest, is $24,150,000.

The claims put forward by the Government were on account of destruction of and damage to ships and cargoes and insurance losses. They have resulted in awards in the total amount of $42,034,794.41, exclusive of interest, as follows: Shipping Board, $16,500,000.00; Veterans' Bureau, $24,319,095.41; Railroad Administration, $1,215,000.00; Government Dispatch Agency, $699.00.

The grand total of the principal thus arrived at would, therefore, be some $184,000,000 (if the sabotage cases are included). Adding interest due, at the rate of 5% from the various dates specified in the awards, America's total bill against Germany on account of both private and Government claims will on this basis approximate $300,000,000. Of this amount there has already been paid to private claimants over $133,000,000. Payments on account of the Government awards are deferred, under the Act, until the private claimants have been fully recompensed.

Eliminating the war-risk insurance premium claims, aggregating in amount claimed $345,000,000, which were categorically dismissed by the Commission as utterly ill-founded, and the Army of Occupation costs estimated at $255,544,810.53, as well as quite some $100,000,000 in duplications and arbitrary exaggerations in initial petitions, the final awards of the Commission so far entered (somewhat more than $255,000,000, including interest) will be about 38% of the amount originally demanded.

These awards were huge compared with those entered by Judge Parker as the sole Commissioner of the Tripartite Claims Commission, though these in turn were greater in amount than the recoveries obtained through several preceding arbitrations to which the United States was a party. The Tripartite Commission rendered awards against Austria totaling $370,032.14 (including interest). These have been paid. Its awards against Hungary totaled $172,619.70. To this must be added some interest. This is because Hungary has not yet been able to arrange for the payment of these awards, due to complications arising from most-favored-nation clauses in settlements with several European powers.

The so-called sabotage claims amount to approximately $40,000,000, including interest. They arose out of the Black Tom and Kingsland disasters in New Jersey in July, 1916, and January, 1917, respectively. These cases were adversely decided by the Commission in October, 1930. But the American Agent has filed petitions with the Commission seeking a rehearing in both these cases. He has tendered important newly-discovered evidence. The petitions have yet to be passed upon by the Commission. Heretofore efforts to reopen cases once decided by the Commission have been comparatively rare and successful in very few instances. Should these petitions be acted upon favorably, the Commission, now much reduced in personnel, will have to continue to function for several more months. Otherwise the Commission's work is now practically completed, and as an organization the Commission will pass out of existence in the near future.

It is interesting to note that this great international claims arbitration has to date cost the Government of the United States for its entire operations some $1,229,000, including the small amount for the Tripartite Commission's activities. It is estimated that in accordance with the provisions of the Settlement of War Claims Act of 1928 the deduction of the very modest charge of one-half of one per cent from the awards as paid should result in reimbursing the Government in the sum of about $1,132,000, including the unfinished work. In other words, the United States will actually be out of pocket only $97,000, the difference between the $1,229,000 and $1,132,000. If the one-half of one per cent deduction is also applied to the Government awards there would be a further recovery of cost of over $345,500, assuming payment of these awards as of the present time. That is, the Government would make an actual profit of some $248,500 as the result of the labors of the Commission.

We will now turn to the related problems.

The return by the United States of German property it had sequestered presented, in the light of the adjudicated and unpaid claims against Germany, a problem fraught with considerable difficulty. This property had been seized under the Trading with the Enemy Act, originally enacted October 6, 1917, and amended from time to time.

Then the property was specifically set aside, under the Knox-Porter Resolution. This was the resolution declaring that the state of war with Germany had terminated with its passage as of July 2, 1921. It set the property aside to be dealt with later by the Congress, as a sort of pledge or security to ensure the payment by Germany of America's war claims once the amounts thereof were finally determined. The resolution (incorporated as a part of the Treaty of Berlin) provided that:

"All property of the Imperial German Government, or its successor or successors, and of all German nationals, which was, on April 6, 1917, in or has since that date come into the possession or under control of, or has been the subject of a demand by the United States of America * * * shall be retained by the United States of America and no disposition thereof made * * * until such time as the Imperial German Government * * * shall have * * * made suitable provision for the satisfaction of all claims * * * of all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America and who have suffered * * * since July 31, 1914, loss, damage, or injury to their persons or property * * *."

On March 10, 1928, Congress enacted the Settlement of War Claims Act of 1928, which also amended the Trading with the Enemy Act. Under the terms of this legislation this property seized from German nationals is rapidly being returned to the former owners or their successors in interest. Out of the $545,228,160.84 worth of cash assets and other property seized by the Alien Property Custodian from alien enemies, $235,370,096.92 had already been returned to the erstwhile enemy owners prior to January 1, 1924, thus leaving in the hands of the Custodian cash assets and other property amounting to $309,858,063.92. In addition there were the German ships seized under the Congressional Joint Resolution of May 12, 1917, and the radio station and patents taken over from German nationals.

This brings us to another outstanding accomplishment, the work of the War Claims Arbiter, functioning under the Settlement of War Claims Act. The first Arbiter was Judge Parker. Before he died he rendered several decisions announcing general principles but decided only two patent cases. He was succeeded, January 13, 1930, by Judge James W. Remick, of Concord, New Hampshire, who has very ably carried on and concluded the work so well begun.

It will be recalled that the German vessels were valued by the Navy Board of Appraisal in 1917 at some $34,000,000. In the suits filed in the United States Court of Claims after the war (dismissed for lack of jurisdiction) the former owners of these ships valued them in excess of $230,000,000. But Judge Remick, applying the particular rule of fair compensation prescribed by the Act, in 1930 judicially determined, after very thorough argument and consideration, that the value of those within his jurisdiction was $74,243,000, *including* interest to January 1, 1929.

The Arbiter wound up his office Dec. 15, 1931. The amounts claimed in the nearly 1,200 cases filed were never accurately defined by claimants but probably aggregated some $500,000,000. They were based on 105 ships, about 6,200 patents, and the Sayville radio station. It is unique in our history that one man has been given sole power of decision, without appeal, in cases involving such vast sums. The onerous trust reposed has been so ably, fairly, and promptly discharged as to meet with entire satisfaction on all sides.

The 288 awards entered by the Arbiter in favor of German nationals in the patent cases and the radio-station claim amount, with interest through 1928, to $12,485,387.83. With the 27 awards in the 94 ship cases, the awards to Germans aggregate $86,738,-320.83 *including* simple interest at 5% per annum from July 2, 1921, through December 31, 1928, as required by the statute. The Act fixed a maximum limitation of $100,000,000 on the awards. The German nationals have been paid one-half of the amount of the awards. Payments on account of the remainder, with interest, will be spread over a long period of years.

The Arbiter has made 136 awards in favor of Austrian nationals, aggregating with interest $912,-687.94, and 11 awards in favor of Hungarian nationals, amounting with interest to $53,799.56—all in patent claims. Austrian nationals are now being paid in full. Hungarian nationals will be fully recompensed when Hungary makes the deposit referred to herein.

Since the passage of the Settlement of War Claims Act and to the date of the latest report there have been filed with the Alien Property Custodian 3,211 "war claims" under that statute. Of them 2,183 have been paid, 607 disallowed, and the balance are pending, with the exception of 300 claims involving trusts of less than $2,000 which have been paid in full.

Of the Austrian claims presented to the Custodian all but a few have been paid, though Austrian nationals had necessarily been delayed in making applications. This was due to the fact that the Settlement of War Claims Act provided that claims of Austrian nationals could be paid by the Custodian only after the Austrian Government had deposited with the Secretary of the Treasury of the United States a sum sufficient to make full payment of the awards in favor of American nationals against Austria entered by the Tripartite Claims Commission. That deposit was made in December, 1928, after it was made certain what the maximum of such awards would be. The work of the Commission was practically wound up in June, 1929. No Hungarian claims have been paid to date for the reason that the Hungarian Government up to the present writing has not, because of difficulties referred to above, deposited with the Secretary of the Treasury of the United States the funds necessary to pay in full the Tripartite awards in favor of American nationals against Hungary.

During 1928, the first year of the operation of the Act, the Custodian and the Department of Justice paid out cash and securities aggregating in value $31,500,600.67. According to the latest report, there has been paid out in cash and securities an aggregate of $138,466,645.68.

After the office of the Custodian was established pursuant to the Trading with the Enemy Act the Congress appropriated certain sums of money during the years 1917 to 1927 inclusive, to take care of the expenses incident to the establishment, equipment, operation, and management of this agency of the Government. However, in 1927 former Senator Howard Sutherland, the present Custodian, decided to ask Congress for no further appropria-

tions for that purpose and to place the office on a self-sustaining basis. With that idea in view, the policy was adopted of deducting one to two per cent from each payment made under each and every trust for expenses incident to administration. Congress in 1927 passed an appropriation sufficient to take care of the Custodian's salary, fixed by statute. But since February 1, 1928, all of the expenses of the office, including that salary, have been paid from moneys held in trust.

Five years prior to this, that is, on March 4, 1923, Congress enacted what is known as the Winslow Act, amending the Trading with the Enemy Act. Under its terms nationals of Germany, Austria and Hungary, and persons who by reason of the war treaties were citizens of no particular country, were entitled to the return of not to exceed $10,000 of the principal held by the Custodian in trust for such former enemy aliens. Since then and up to the date of the latest report, 42,823 so-called Winslow claims have been filed with the Custodian. Nearly all of them have now been paid in full. The Act also provided for the return of income accruals upon money and/or other property held by the Custodian up to but not exceeding $10,000 for each trust in any one year, beginning March 4, 1923. Pursuant to this vast sums of money have been paid out to erstwhile enemy aliens.

One interesting point of law may be mentioned. For more than three years after the passage of the Winslow Act the Department of Justice and the Law Division of the office of the Alien Property Custodian held that $10,000 might be returned to a partnership or that the sum of $10,000 might be allocated among the partners constituting the partnership. But in deciding a suit instituted in the Supreme Court of the District of Columbia (Siegert *v.* Sutherland) the Court held that where the partnership assets were seized by the Custodian as being enemy-owned and the partners consisted of, say, three German nationals, one Brazilian national, and one American national, each of the German partners was entitled to the return of $10,000; that the Brazilian partner (or any other partner whose citizenship might be that of a neutral country) was entitled to the return of all of his property; that by operation of law the partnership was dissolved as of the date of the declaration of the existence of a state of war, April 6, 1917, and that the American partner was authorized under the law to assume control of the partnership assets, wind up the firm's business, pay off its debts and obligations, and then remit to the Custodian that portion of the proceeds derived from the sale and/or liquidation of the partnership assets belonging to the alien enemies. This principle and the law generally with respect to partnership property as applied to seizure of such property by the Custodian during the War have now been definitely established by the Supreme Court of the United States and other Federal Courts.

So it will be seen that so far as concerns the United States very fair progress has been made in the winding-up of the numerous complicated matters arising out of the various pecuniary claims which had their origin in the great World War, hostilities in which ceased thirteen years ago. The United States has been able to secure the satisfaction of the claims of its own nationals and itself while living up to its traditional respect for the property of aliens. Neither the Congress nor the country has on the whole any substantial reason to doubt the wisdom of the solution, reached after considerable study and some compromise, formulated in the Settlement of War Claims Act of 1928.

OPINIONS OF COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES

Opinion 39

Employment—Attorney in Public Employ—A public prosecutor may not properly accept private employment in connection with any matter which he has investigated or is investigating in his official capacity.

A prosecuting attorney, in the performance of his official duty, joined with police officers and an agent of the Board of Underwriters in investigating the origin of a fire which destroyed a building which was insured. The facts were such as to arouse suspicion as to the responsibility of the assured for the fire, but the investigation did not produce information which would warrant the prosecution of the assured. Subsequently, the prosecuting attorney who, under the law of the state, is allowed to handle private cases, was employed by the assured to collect the insurance and, if necessary, to bring suit for that purpose.

As the propriety of the prosecuting attorney's conduct has been questioned by an associate, and as both are members of this Association, they request the Committee's opinion as to whether it was proper for the prosecuting attorney to accept employment of the nature stated.

The Committee's opinion was stated by MR. GALLERT, Messrs. Howe, Hinkley, Evans, Harris and Strother concurring.

In the opinion of the Committee it was professionally improper for the prosecuting attorney to accept the employment described in the question. Canon 36 of Professional Ethics provides that "a lawyer, having once held public office or having been in the public employ, should not after his retirement accept employment in connection with any matter which he has investigated or passed upon while in such office or employ." If a lawyer after his retirement from public office should not accept employment in connection with any matter which he has investigated or passed upon while in public office it seems clear that he should not accept such employment while he is still in public office.

As stated in Opinion 30 the Committee also believes that the provision of Canon 31 of Judicial Ethics to the effect that a judge "who practices law is in a position of great delicacy and must be scrupulously care-

ful to avoid conduct in his practice whereby he utilizes or seems to utilize his judicial position to further his professional success" is applicable to public prosecutors "who should even at a personal financial sacrifice be and remain above suspicion."

Opinion 40

Conflicting Interests—Improper for an attorney to represent both a bankrupt and his creditors as their interests are adverse.

A member of the Association desires to know whether it is proper for an attorney who is representing a bankrupt to also represent creditors in the filing and handling of claims against the bankrupt estate.

The Committee's opinion was stated by MR. GALLERT, Messrs. Howe, Hinkley, Evans, Harris and Strother concurring.

Inasmuch as the interests of a bankrupt and the interests of his creditors in a bankruptcy proceeding are adverse, it is professionally improper for an attorney to represent both the bankrupt and his creditors in such a proceeding.

Opinion 41

Lay Intermediaries—Attorney cannot properly allow his name to be used by a lay intermediary which advertises to furnish legal services of any nature.

Advertising—Improper for an attorney to permit the use of his name by lay intermediary which advertises to furnish legal services of any nature.

A member of the Association asks the Committee to express its opinion as to whether it is proper for a lawyer who is a director of a bank or trust company, to allow his name to appear as a director in its advertisements which offer its services to the public in drawing wills and trust agreements and in making examinations of titles.

The Committee's opinion was stated by MR. GALLERT, Messrs. Howe, Hinkley, Harris, Evans and Strother concurring.

This Committee has already held, in Opinion 31, "that it is improper for an attorney to aid a corporation to practice law or in any way to participate in or sanction such practice." It is therefore improper for a lawyer to allow his name to appear as a director, officer or employee of a bank or trust company which, in its advertisements, offers to draw wills or trust agreements, give opinion on titles or perform other legal services.

Opinion 42

Advertising—By means of special "write-ups," for which the lawyer furnishes photographs and other material.

Advertising—By posing for photographs of incidents connected with divorce trials, which photographs are to be used to illustrate newspaper or magazine articles.

Photographs—Impropriety of furnishing or posing for them, for publication in connection with "writeups" or newspaper or magazine articles which give the lawyer publicity in connection wth divcrce matters.

Impropriety—Not altered by a court's acquiescence therein.

Because of the liberal laws of a certain state, many persons from other sections acquire a residence there for the purpose of procuring a divorce. Many lawyers have moved to this state for the apparent purpose of participating in this particular field of practice, and the competition among them leads some of them to adopt skillfully devised schemes to secure advertising and publicity. This has led a member of the Association in that state to ask the committee to express an opinion as to:

(1) Whether a lawyer may properly furnish pictures or material for special write-ups of divorce matters to newspapers, magazines, or other publications, where he expects or intends that his name will be used in connection with the publication thereof.

(2) Whether a lawyer may properly pose for pictures portraying incidents in connection with divorce suits or the several steps from the inception of a divorce case to its finish, for publication in magazines or newspapers, the intent being that such publication shall be accompanied by some complimentary reference to the attorney, and whether the answer would be varied by the fact that the court itself participates in the posing, and allows the courtroom to be used for making such a picture.

The Committee's opinion was stated by MR. HINKLEY, Messrs. Howe, Evans, Harris and Strother concurring.

Canon *27* prohibits indirect as well as direct forms of advertising. Both questions describe conduct which is intended to bring the lawyer and his qualifications in a certain branch of his profession into the limelight, and must therefore be disapproved as an indirect form of advertising, which is forbidden by the Canon. The fact that a court acquiesces in the conduct described in the second question does not alter its impropriety.

Opinion 43

Advertising—Any payment made by a lawyer for the purpose of securing the publication of his photograph, causes such publication to become advertising.

Photographs—Impropriety of paying for their publication, even though the payment be only for the supposed cost of some item connected with such publication.

The Sunday edition of a metropolitan newspaper publishes a so-called "Greater Blanktown" edition, which includes many pages of photographs of supposed prominent citizens, with a statement under each photograph of the name and occupation of the person. Each person whose photograph is published agrees to pay therefor a certain definite sum. Contracts for such publication are frequently solicited on the theory that the signers are thus contributing to something of civic benefit though each person whose photograph is thus published is supposedly "invited" to allow it to be thus used. He is, nevertheless, required to agree to pay a certain definite sum for such publication, though this amount is frequently stated to represent only the "cost" of publication.

A number of members of the Association have asked the Committee to express an opinion as to whether a lawyer may properly furnish his photograph to a newspaper and agree to pay for having it so published. Other members have asked whether a lawyer who does not, under such circumstances, agree to pay for the publication of his photograph, may with propriety agree to pay the publisher for the supposed "cost" of making the half-tone plate.

The Committee's opinion was stated by MR. HINKLEY, Messrs. Howe, Evans, Harris and Strother concurring.

A photograph of a lawyer, accompanied by a statement of his name, address and vocation is not a professional card and its publication, if paid for by the lawyer, either directly or indirectly, becomes a solicitation of business by advertising which must be condemned as a violation of Canon *27*. The attention of

the public is drawn in an unusual manner to the lawyer in connection with his profession. One of the features which distinguishes an advertisement from a news or literary article is the fact that its publication is paid for by the one receiving the benefit of the publicity and the amount of the payment or what particular item of cost the payment is supposed to cover are immaterial.

Opinion 44

Employment—Termination of—When a client's conduct make it the duty of a lawyer to terminate his employment.

Improprieties of Client—The lawyer's duty to the court and to the client when a client's improprieties become known to him.

An attorney is employed to represent the defendants in a suit involving the interpretation of a written lease. During the trial of the case, the judge is approached by persons, purporting to represent the defendants, who attempt to influence him in favor of action in behalf of the defendants. The judge declares a mis-trial, stating that his action is based upon the attempts which have been made to influence his decision. The attempt to influence the judge was done without the knowledge or acquiescence of the attorney and the defendants do not admit that the attempt was made with their knowledge or consent. The attorney, who is a member of the Association, asks whether, under such circumstances, it is proper for him to represent the defendants in a new trial.

The Committee's opinion was stated by MR. HARRIS, Messrs. Howe, Hinkley, Evans and Strother concurring.

There is no impropriety in the attorney representing the defendants in the new trial. This opinion is based upon the assumption that the improper efforts to influence the judge were neither authorized by the defendants nor in any manner participated in or encouraged by them or their attorney. Canons 15, 16, 22 and 44, together with generally accepted standards of propriety, require the highest degree of integrity and fair play on the part of lawyers in connection with the trial of causes, and demand that they restrain their clients from improper attitude and conduct towards the courts.

Nothing in these Canons, however, permits a lawyer to abandon a client's interests because of the misconduct of others. Indeed Canon 44, it seems to us, requires the lawyer to stand by an innocent client under such circumstances as set forth in this question.

However, if the attorney's client had authorized or knowingly permitted such wrongdoing and such facts were known to the attorney, it is our opinion that, unless the clients apologized to the court and evidenced genuine repentance, counsel should withdraw from the case.

Opinion 47

Candor and Fairness—Candor and fairness require that an attorney who has inadvertently received, by reason of family relationship with counsel for the adverse party, an improper disclosure of the adverse party's confidences should withdraw from the case and preserve inviolate the confidences thus obtained.

Confidences of Adverse Party—When it becomes an attorney's duty to protect them because improperly received.

An attorney, A, is retained by a client to file suit for the recovery of certain lands and for the proceeds of the timber and oil that have been removed therefrom. The main question involved is the good faith of W, a corporation, who bought the lands at an administrator's sale. B, a lawyer, residing in another city, is a nephew of A, and is attorney for W. Before starting suit A writes B that he has been retained in the matter and states that, as he knows B represents W, he would like B to give him the facts from his client W's standpoint, in order that he may properly advise his client. Nothing in his letter would indicate that he wished B to divulge any confidential information.

B replied to his letter, sending A, *in confidence*, a copy of his files in the matter which clearly shows that W did not obtain title in good faith. A, being a member of the Association, asks the Committee's opinion as to whether he can, or must, use the information thus obtained, or whether he should ignore it and proceed without using it and without advising his client that he has it.

The Committee's opinion was stated by MR. HARRIS, Messrs. Hinkley, Evans, Gallert and Strother concurring.

In the opinion of this Committee A should, in the circumstances outlined, withdraw from the case, return the file to B, and preserve inviolate the confidential information therein contained.

Clearly, but for the relations existing between A and B, this instance could not and would not have occurred. It is difficult to understand how B came to disclose the confidences of his client to A, even though A was his uncle. *See Canon 37.*

The first paragraph of Canon 22 reads "the conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness." It would be unfair to W if A were to remain in the case or disclose the contents of W's file to his client. B's indiscretion in this matter calls for the utmost efforts on the part of A to prevent any wrong being done to B's client.

Opinion 48

Division of Fees—A lawyer may not properly divide his fees with a layman who handles patent applications or makes patent searches.

A member of the Association calls the Committee's attention to the fact that many of the persons who are enrolled in the U. S. Patent Office as so-called "attorneys" who are eligible to handle patent and trade mark applications in that office, are not and do not claim to be attorneys at law. He asks whether a lawyer may properly, in the handling of patent and trade mark applications, be associated and divide fees with such a layman. He also desires to know whether a lawyer may properly refer patent and trade mark searches to such a layman and divide with him the fees received for such search.

The Committee's opinion was stated by MR. HOWE, Messrs. Hinkley, Evans, Harris and Strother concurring.

As Canon 34 condemns any division of fees with laymen or lay agencies, it must necessarily be improper for a lawyer to divide his fees with a layman who handles patent applications or makes patent searches. An attorney may quite properly *employ* such a layman, paying him for his services in the same manner as any other person who is not admitted to the practice of law (such as a draftsman or an engineer) would be paid for services rendered in connection with the matter, such payment being charged to the client in the same way that other items of expense are charged.

Proposal for Single Court of Patent Appeals Again Rejected

THE proposal for a Single Court of Patent Appeals has again been recently agitated and widely circulated by its sponsors. It has frequently been urged since first brought to the attention of the American Bar Association in 1898.

The new proposal differs in no important respects from the draft of the bill voted down by the Section on Patent, Trade-Mark and Copyright law in 1920, and by the Association itself at its annual meeting in that year. Briefly, it is to establish a Single Court of Patent Appeals of seven Justices, to sit primarily in Washington. The annual salaries of the Justices would be $13,500 for the Chief Justice, and $13,000 for each of the Associate Justices.

This court, when organized, would remove from the jurisdiction of the several Circuit Courts of Appeals of the United States, all appeals in patent cases. By the proposed bill questions of contract, trade-names, unfair competition, violation of the Anti-Trust statutes, and other matters of general law, frequently involved in patent causes, are left to the jurisdiction of the present Courts of Appeal.

The qualifications for members of the proposed court are perscribed as follows: "Experience in the adjudication of a substantial number of patent cases on the Federal bench or in the practice of the patent law in the Federal courts shall be requisite to appointment as chief justice or an associate justice of said court, to the end that only judges who have shown special aptitude for the adjudication or the practice of the patent law shall be appointed to said court."

Presented to the meeting of the Section on Patent, Trade-Mark and Copyright law of the American Bar Association, held at Atlantic City, on September 17, 1931, the proposal met with little favor and was strongly disapproved by an overwhelming vote. At that meeting Edwin J. Prindle and Henry D. Williams, of New York, urged the adoption of the proposed bill.

They stated: (1) That under the existing system a patent may be valid in one circuit and invalid in another; (2) That in a single circuit a patent may be invalid as to one person or corporation and valid as to others; (3) That the validity of a patent cannot be finally determined without several suits at great expense; (4) That many courts of appeal and the technical character of questions of fact presented render diversity of opinion likely.

In opposition, Wallace R. Lane, of Chicago, pointed out: (1) That patent cases do not admit of segregation from other litigated cases on any logical basis; (2) That any real diversity of opinion between Circuit Courts of Appeal is readily remediable in the Supreme Court; (3) That objections to the present plan are more fanciful than real; (4) That the proposed single court of patent appeals, instead of remedying any supposed defects in such system, would on the contrary be more objectionable, tending to narrow the field of patent law, to develop a highly technical, bureaucratic court, entailing hardship upon litigants and lawyers, and increased expense upon litigants and taxpayers; (5) And that the present system, after more than forty years of practical working, has proven to be fundamentally sound.

He also produced letters from a large number of attorneys practicing in the Federal Courts, expressing their disapproval of the proposed change. It was in the light of such discussion and expressions that the Section voted down the proposal.

In addition to the action taken by the Patent Section of the American Bar Association, the following Associations have disapproved of the proposal:

(1) The Committee on Patent Law and Practice of the New York Patent Law Association adopted the unanimous report of its sub-committee, which stated that it "is convinced that the proposed bill is unsound in principle and for this reason recommends that it be not approved."

September 14, 1931, the Board of Governors of the New York Patent Law Association adopted this report and was officially represented by Richard Eyre of New York at the Patent Section Meeting of the American Bar Association for the purpose of opposing the bill.

October 1, 1931, it had the unanimous approval of the New York Patent Law Association.

(2) October 9, 1931, the Cleveland Patent Law Association unanimously approved the unanimous report of its committee, recommending that the proposed single court of patent appeals be disapproved.

(3) October 9, 1931, the Committee on Patents of the Association of the Bar of New York City, unanimously recommended that the proposal for a single court of patent appeals in the federal judicial system be disapproved.

October 20, 1931, the Association of the Bar of New York City adopted this report.

Constitutional Elephantiasis in California

A MEMBER of the California Bar views with growing alarm the "ever expanding California Constitution" in the December issue of the State Bar Journal of that commonwealth. In fifty-two years, he says, it has expanded to about three times its original size, and the future is dark with danger of further increase. He says:

"The Constitution of 1879, when adopted, contained approximately 22,000 words. By 1905 it had grown to more than 25,000; by 1920 to more than 53,000 words, and by 1930 to more than 62,000 words. Since its adoption, approximately one hundred and fifty amendments have been made to the Constitution, with an ever increasing ratio, some twenty being adopted in 1928. There are but few provisions which have not been changed. These amendments extended to all manner of subjects of legislation.

"Should this same ratio of increase continue for the next fifty years, if we base the increase upon the fact that the Constitution is now about three times as large as when adopted, it would mean that the Constitution would then contain approximately 200,000 words. If on the other hand we should base the increase upon the average increase of about 1,000 words per year, it would mean that the Constitution at the end of fifty years would have 112,000 words therein."

LETTERS OF INTEREST TO THE PROFESSION

A Suggestion as to Prints and Rare Law Books

EDITOR, AMERICAN BAR ASSOCIATION JOURNAL:

The very interesting exhibits of prints and rare law books so beautifully arranged by our hosts at the Atlantic City Convention leads me to revive a suggestion heretofore made. It is this: that each lawyer make some proper provision to the effect that those charged with the administration of his estate shall submit to a designated bar association for acceptance by its proper officers, any rare law books, prints, cuts, busts, engravings, or the like, which may be found in the law offices or law library of the deceased. I have found several times, upon the decease of lawyers, that the survivors had no appreciation whatever of such matters. Very often, however, such books have a historic value. For instance, a book on Patent Law or Trade Marks published in 1870 has no real value in the actual practice of today, but is priceless to a research student as part of a collection of all books on the subject, arranged chronologically. So also committees on other subjects of law could collect all printed matters on their topics, and thereby collect valuable material, in addition to the general working library of their Bar Association, no matter how complete it may be. These prints, steel and wood engravings, of the great leaders of the Bar and Bench increase in value as the years go on. The foregoing suggestion is intended to apply to the casual collector. In such cases, where a lawyer has made a hobby of collecting such prints and has accumulated a large library, he, of course, usually disposes of it expressly in his will. Perhaps some reader may be induced to direct that his Bar Association shall become his beneficiary in respect to such matters.

New York, Sept. 21, 1931. C. P. GOEPEL.

Legal Authors and Legal Progress

EDITOR, AMERICAN BAR ASSOCIATION JOURNAL:

Increasing importance is being attached to legal essays appearing in Reviews and Journals. They are being utilized by attorneys in preparing their cases for final review by the higher tribunals, and constantly cited by these courts. Formerly these articles were considered to emanate from professors who were removed from the scene of strife. In many instances they were thought to confuse the issues and upset the due administration of justice. In later years judges and attorneys have come to realize that these authors are possessed of a philosophical perspective of the problem and are elementally sound in their conclusions. As a rule, the men who are applying themselves to the cases at hand are concerned only with the disposition of these cases. They do not have a philosophical background. As a result, they seldom offer any contributions which will improve the general administration of justice.

It is a good sign that the value of articles by legally-trained scholars is being appreciated by the practitioners. Out of the respect paid them, we can expect much improvement in the next few years. The work of the American Law Institute, for instance, will not only improve the administration of justice but will simplify the practice so that it will become a more stabilized and scientific undertaking. In the field of criminology, these authors have been illuminating the path of criminal law and administration to such an extent that the system that has prevailed for years seems to be in danger of being entirely overthrown. The danger should be welcomed. That the prevailing system should have considered only the offense and not the offender, for instance, is a striking illustration of its utter futility in making progress in this field.

The practitioner should not be relied upon to contribute improvements in the general administration of the law when his entire time and energy are concerned with the disposition of cases in his office. The law is not a field of research for him. His mind is not trained to contribute improvements. After all, environment moulds the type of mind as well as the character of an individual. A professor who is legally-trained looks upon the law as a field of research. His office is a laboratory. He investigates, he analyzes, he comes to logical conclusions. The service that he renders is not spectacular. Money is of little consideration to him. He has plenty of time to devote to the subject. Therefore he should be courteously listened to by members of the bar. His contributions to legal journals should be encouraged as they undoubtedly form the best means of obtaining fundamental improvements in the administration of justice. It is not to be expected that these recommendations will always be sound or practical, but it can be safely said that they are very likely to be. Inasmuch as none may be expected to come from practitioners engrossed in handling instant cases, these authors are the main hope for future progress.

Chicago, Nov. 23, 1931. CHARLES C. ARADO.

Pennsylvania Proceeding for Summary Judgments

EDITOR, AMERICAN BAR ASSOCIATION JOURNAL:

It seems remarkable, considering all that has been said and written in regard to summary judgments, that the very excellent practice in Pennsylvania has to a large extent been ignored.

I suppose that one reason is that Pennsylvania lawyers have become so familiar with our practice that they do not realize that their proceeding for summary judgments is a model that might be followed by other States. A further reason is that we are not familiar with the expression "Summary Judgments." We do not consider a judgment entered on the pleadings as "Summary."

The Pennsylvania practice did not spring full grown from the wisdom of the Legislature, but is the gradual growth of nearly a century. The principle underlying the practice is the positive requirement of an Affidavit of Defense under oath, containing a full and concise legal defense. The practice dates back nearly a century to the local Courts in Philadelphia County. They first adopted rules requiring such Affidavits in certain actions. These rules were gradually extended to other counties, and as their merits were proven by practice, the Legislature from time to time enacted the various rules into Statutes making them uniform throughout the State.

The last Act which consolidated and enlarged the practice was passed in 1915. This Act includes all actions of Assumpsit and Trespass. The Legislature having by previous Acts consolidated all common law actions, except Replevin and Ejectment, into the two actions of Assumpsit and Trespass.

The writer believes that for brevity and conciseness the Act is an example seldom equaled in Legislature enactments. Except as to one or two special requirements pertaining to the Affidavit of Defense, the pleadings are the same in both Assumpsit and Trespass.

To show the concise character of the Act, it only contains twenty short paragraphs and occupies less than four pages of the Pamphlet Laws of 1915. With the exceptions of Ejectment and Replevin, this covers the entire field of pleading and practice in civil actions in Pennsylvania.

In the Action of Assumpsit, the pleadings consist of Plaintiff's Statement of Claim, Defendant's Affidavit of Defense, and where a Set-off is claimed by the defendant, Plaintiff's Reply. Upon the filing of these pleadings, the case is at issue.

The pleadings can only contain a statement in a concise and summary form of the material facts and must be divided into paragraphs, numbered consecutively, each of which must contain only one material allegation. For a breach of these requirements, the pleading will on Motion be stricken from the record.

All pleadings must with a few exceptions be sworn to positively. Affidavits on information and belief are insufficient. The principle of the affidavit rule is that if a party to a suit cannot swear positively to material facts, there is little possibility that he will be able to prove same on the trial by competent witnesses.

The Statement of Claim is filed with a Praecipe for Summons and a copy served by the sheriff with the summons. This Statement is endorsed as follows: "To the within defendant: You are hereby required to file an Affidavit of Defense within fifteen days from the service hereof."

If the defendant does not file his Affidavit as required by the notice, judgment is entered for plaintiff. If an Affidavit is filed, but in the opinion of plaintiff is not sufficient, a Motion is then filed for judgment for want of a Sufficient Affidavit of Defense. This Motion is immediately placed on the Argument List and heard by the Court in Banc. If the Motion is granted, judgment is entered for plaintiff. This judgment has all the force and effect of a judgment on a verdict with the same right of appeal. If the Motion is refused, the case goes on to a jury trial. On the jury trial all averments of facts in the Statement not sufficiently denied in the Affidavit are taken as admitted. As the pleadings are thus made com-

petent testimony, false swearing is subject to the usual penalty for perjury.

In the writer's experience in at least fifty per cent of the cases, no Affidavit is filed and judgment is immediately entered for plaintiff. Of the balance at least fifty per cent are finally determined on Motions for judgment for want of a Sufficient Affidavit of Defense, that is, in seventy-five per cent of the cases, final judgment is secured within fifteen days to three months from the date of filing suit.

The writer believes that a few quotations from the Opinions of the Supreme Court will best illustrate the force and effect of this practice.

"The object of the affidavit of defense rule is to hasten final judgment." "The spirit of the affidavit of defense law abhors evasion and equivocation and punishes this by entering judgment for plaintiff." "The affidavit should state the facts specifically and with sufficient detail to enable the Court to see whether or not they amount to a defense."

"An affidavit of defense is to be taken most strongly against the defendants and it is presumed that he has made it as favorable to himself as his conscience will allow." "It shall not be sufficient for a defendant to deny generally the allegations in the Statement of Claim; but he shall answer specifically each allegation of fact, of which he does not admit the truth." "Omissions from the affidavit cannot be supplied by possible inference from the stated facts." "The defendant must be presumed to have made all essential statements, which could have been truthfully averred." "The defendant must make his denial so clear and specific that at the trial the Court may know exactly what the issue is." "All doubt must be resolved in favor of the plaintiff." "The affidavit must contain all the facts necessary to make a legal defense."

The above decisions show clearly the spirit with which the Court is construing this Act.

Under this practice, there can be no delay in filing the affidavit, unless specific reasons are shown to the Court and even in such case, the time is never extended for over fifteen or thirty days.

The teeth of the Pennsylvania practice are in the requirement of a positive oath to the pleading and the penalty for false swearing.

The writer believes that the Pennsylvania practice fully equals that of Canada and England and is superior to that in the majority of the States and might well be considered as a model for those States desiring to reform their practice.

New Castle, Penn. EDWIN M. UNDERWOOD.

Long Judicial Service

EDITOR, AMERICAN BAR ASSOCIATION JOURNAL:

I wrote you on September 15th with reference to the long service of Justice Mark A. Fullerton of the supreme court of the State of Washington. Justice Fullerton died within a few days of the date of my letter.

I examined the federal reports and the national reporter system to find the names of judges who had served continuously on the supreme court for an equal or greater term than Fullerton. I found four names and wrote to each of the four judges and received the following information which I think would be of interest to the bar.

Chief Justice William A. Johnston of Kansas reports that he was elected to the supreme court in November, 1884, took office December 1, 1884, and has served continuously as a member of the court since that time, approximately forty-seven years, having been elected nine times and been chief justice since January, 1903.

James Pennewill reported that he was appointed to the supreme court of Delaware in 1897 for a term of twelve years, has served continuously by reappointments and has been chief justice since 1909.

Frank W. Parker of the supreme court of New Mexico was appointed to the territorial bench by President McKinley and commenced serving January 10, 1898. At the first state election in 1911 he was elected a member of the supreme court and has been continuously elected every eight years thereafter. His present term will expire January 1, 1937. His present service has been thirty-three years and eight months.

Justice John Campbell of the supreme court of Colorado was elected judge in November, 1894. His term began in January, 1895. He served until January, 1913, but was defeated in November 1912, when he ran on the Republican ticket and the Democrats carried the state elections. On May 20, 1922, he was appointed to fill a vacancy on the supreme court bench and has been re-elected and his present term will expire in January, 1937. His service on the bench has not been continuous but has aggregated twenty-eight years and two months.

Seattle, Sept. 28 W. Z. KERR.

"When May a Police Officer Slay?"

EDITOR, AMERICAN BAR ASSOCIATION JOURNAL:

In reading the interesting article on "When May a Police Officer Slay in Making an Arrest" in the October issues of the JOURNAL, I have been struck by several answers that might be made to major portions of the article.

Of course since the article in question was made up of the author's views and theories concerning what ought to be the law in such cases, it lets the bars down for theories on the opposite side as well. First, the incident cited in the article of the officer scattering the mob by the mere sight of a Winchester rifle could be used to substantiate the viewpoint of a considerable portion of the bar here and elsewhere, namely, that it is unnecessary in the vast majority of cases for an officer to resort to the arms which he bears to accomplish a desired result. As a further corrollary to that proposition, countless incidents could be cited where persons have been killed unnecessarily by officers who have been cleared entirely, or with a minimum sentence, simply and solely because of the fact that they wore the badge of authority in some capacity.

My views on the subject given, even at the risk of laying myself liable to be classed as an exponent of "neurasthenic propaganda restricting an officer in the execution of his duty," or as the evolver of a "fine spun theory in the office of a lawyer who has had no practical experience in the administration of the criminal law," my views, neurasthenic and fine spun as they may be, are that an officer actually and actively engaged in the enforcement of the criminal laws should be allowed to bear arms but should be held strictly to account should they be used illegally. One might state that such is the case, but anyone who has had "practical experience in the administration of the criminal law" knows the opposite to be the case. Witness the custom of removing the trial of a federal officer to the federal court, placing the federal district attorney as his defense counsel. Follow the sentences given those officers when they are found guilty; they will almost invariably be found to be much lighter than in the case of a private citizen who unlawfully kills or wounds another. This should not be the case. An officer is vested with authority for a definite purpose—to enforce, uphold and administer the law—certainly not to break it, and when he breaks it by using arms given him for legal purposes, his badge should confer on him no special privileges in the eyes of the law, but furnish rather an additional element to be considered by the jury or court in passing sentence upon him.

Entirely too many different classes of officers are now vested with the authority to carry arms. In my own state of Tennessee quite recently a deputy fire-marshal was accidentally killed by his revolver falling out of his holster, while he was peacefully siting at his desk in his office. What need had he for an arm there? In Tennessee the law, save as to city policemen, has been construed as authorizing sheriffs, their deputies, constables and the like to bear arms only when acting under criminal process such as criminal warrants or capiases issued by the criminal courts. Yet every deputy sheriff in Tennessee goes armed to the teeth when serving civil process, when loafing or, in short, at all times when not taking a bath. Every firearm on the person of a citizen, whether officer or not, is a potential menace. There is no need for such excessive armament. When every deputy sheriff, game warden, fire marshal, tax collector, constable, watchman and private detective is authorized, or is permitted by sufferance, to go armed the number of untrustworthy individuals is thereby necessarily increased.

I do not advocate, nor expect, officers of the law apprehending criminals to do so armed only with fly-swatters, although the British police have remarkably good results without the use of firearms, yet I see no rhyme nor reason and certainly no justification in going forth armed as to kill a bear when engaged in duties free from danger such as serving civil process, checking up on tax returns, gathering divorce evidence or similar functions. The officer should understand that he is vested with authority to bear arms to be used only in cases of extreme necessity and should those arms be used for any other purpose, the penalty to be visited on his head would found to be severe. If such understanding were common among officers, there would be found to be less necessity for the bearing of arms.

Badges of authority ofttimes warp a man's powers of reason and especially his sense of proportion of the importance he bears to the human race in general. Mr. Franklin freely admits this in his cited article but he says there that if we "have officers in whose discretion we cannot place reliance, then we should get rid of them and not hamper the officer in whom we can impose trust in the performance of his duty." This would appear to be a trifle too mild. Let us suppose

that I am a motorcycle officer engaged in the hazardous duty of apprehending dangerous individuals who drive two miles above the speed limit, or who have the misfortune to drive across my path when I have not enjoyed my breakfast. Engaged in these duties I am armed with a revolver, a blackjack, handcuffs and a whistle. I apprehend a speeder who resents my abrupt inquiry as to who the hell he thinks he is and who commits the unpardonable sin of talking back to a cop. One word leads to another and we engage in fisticuffs. Two private citizens would fight it out, but I draw my revolver and shoot him, without justification and without right in the law. Then according to Mr. Franklin I am incompetent and should be discharged even if I go scotfree in the courts as I am apt to do, but no other officer is hampered one jot or tittle in carrying his revolver or in using it.

Such a line of reasoning does not ring true with established American ideals. Tyranny is tyranny whether practiced by monarch or by officer. A dog has been said to be entitled to one bite, and now Mr. Franklin believes an officer entitled to one shot. That is a bit hard on the shootee, who should have been entitled to rest serenely on the protection afforded him by the law.

On the behalf of the proverbial innocent by-stander who is so often shot and on behalf of the victim of the incompetent officer, let me register a protest against the too common custom of policemen shooting first and asking questions afterward.

JOSEPH W. BYRNS, JR.

Nashville, Tenn., Nov. 23, 1931.

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BENJAMIN B. TAYLOR, Louisiana National Bank Bldg., Baton Rouge.
FELIX J. DREYFOUS, Canal Bank Bldg., New Orleans.

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CHARLES HENRY BUTLER, Woolwich.
WILLIAM S. LINNELL, 188 Middle St., Portland.
SHERMAN N. SHUMWAY, 45 State St., Bangor.
NATHANIEL TOMPKINS, Houlton.
ROBERT B. WILLIAMSON, Augusta Trust Bldg., Augusta.

Maryland

HON. WALTER I. DAWKINS, The Severn, Baltimore.
D. LINDLEY SLOAN, The Dingle, Cumberland.
RAYMOND S. WILLIAMS, 1604 Citizens National Bank Bldg., Baltimore.
J. PURDON WRIGHT, Maryland Trust Bldg., Baltimore.
JAMES W. CHAPMAN, JR., 912 Continental Bldg., Baltimore.

Massachusetts

THOMAS J. BOYNTON, 294 Washington St., Boston.
GLEASON L. ARCHER, Dean, Suffolk Law School, Boston.
GEORGE R. GRANT, 50 Oliver St., Boston.
JOHN W. MASON, 24 Harrison Ave., Northampton.
CLIFFORD A. COOK, 211 Main St., Millford.

Michigan

CARL VANSTONE ESSERY, 2822 Union Guardian Bldg., Detroit.
PAUL A. LEIDY, University of Michigan Law School, Ann Arbor.
JEROME WEADOCK, 301-3 Bearinger Bldg., Saginaw.
HARRY A. SILSBEE, Capitol Tower, Lansing.
ARTHUR H. RYALL, First National Bank Bldg., Escanaba.

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D. F. FOLEY, 754 McKnight Bldg., Minneapolis.
EDWARD A. KNAPP, 915 Mer. National Bank Bldg., St. Paul.
HON. HENRY N. BENSON, State Capitol, St. Paul.
ROLLO F. HUNT, 500 First National Bank Bldg., Duluth.

Mississippi

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R. C. STOVALL, Box 36, Okolona.
A. W. SHANDS, Cleveland.
W. S. WELSH, Laurel.
J. MORGAN STEVENS, Standard Life Bldg., Jackson.

Missouri

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CHARLES M. BLACKMAR, 906 Commerce Bldg., Kansas City.
JAMES L. PARKS, University of Missouri, Columbia.
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JAMES E. KING, 1426 Boatmen's Bank Bldg., St. Louis.

Montana

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W. H. HOOVER, First National Bank Bldg., Great Falls.
MILTON C. GUNN, Montana Life Ins. Co. Bldg., Helena.
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FREDERICK S. BERRY, Berry Bldg., Wayne.
J LEO CLEARY, Grand Island.

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WILLIAM J. BRITTON, Wolfeboro.
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DUANE E. MINARD, 24 Branford Place, Newark.
HON. J. HENRY HARRISON, 810 Broad St., Newark.

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FRANCIS J. SULLIVAN, 120 Broadway, New York City.
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North Carolina

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JULIUS C. SMITH, Jefferson Standard Bldg., Greensboro.
VONNO L. GUDGER, Law Bldg., Asheville.
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ALVIN RICHARDS, Pure Oil Company, Tulsa.

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JOHN R. MCFIE, JR., P. O. Box 2487, Manila, P. I.
WILLIAM C. BRADY, P. O. Box 760, Manila, P. I.

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THOMAS H. GARDINER, 87 Weybosset St., Providence.

South Carolina

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ARTHUR R. YOUNG, 28 Broad St., Charleston.
ALFRED HUGER, 18 Broad St., Charleston.
W. E. BOWEN, Chamber of Commerce Bldg., Greenville.
L. D. LIDE, Box 520, Marion.

South Dakota

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HON. GEORGE PHILIP, Box 607, Rapid City.
TORE TEIGEN, 120 West Eleventh St., Sioux Falls.
MARK W. SHEAFE, Watertown.
ST. CLAIR SMITH, 1013 North Lincoln St., Aberdeen.

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NEWS OF STATE AND LOCAL BAR ASSOCIATIONS

California

State Bar of California Holds Fourth Annual Meeting

The Fourth Annual Meeting of The State Bar of California, held at Del Monte, October 1, 2 and 3, 1931, evidenced to those who have been closely identified with this movement since its inception much gratifying progress, according to the State Bar Journal of November.

"The outstanding feature of the convention was the manifestly greater solidarity of the bar. While there was debate, it lacked those qualities of acrimony and asperity that have been apparent in some recent criticisms of the Board of Governors and their policies. When the convention adjourned the greatest good feeling prevailed and expressions of satisfaction over the convention's accomplishments were numerous.

"That the efforts of the retiring President Leonard B. Slosson, of Los Angeles, were appreciated was evidenced by votes of thanks extended to him by the Board of Governors and by the convention itself.

"Reviewing the first four years of The State Bar and pointing out that all questions raised as to the validity of the powers conferred by the State Bar Act have been resolved in favor of The State Bar by the Supreme Court, defending the procedure of The State Bar and the members of the Board of Governors against accusations of tyranny and lack of diligence leveled at them and empha sizing the value of The State Bar as a regulatory agency in the public interest and for the benefit of the lawyers, President Leonard B. Slosson of Los Angeles delivered his annual address at the opening session of the fourth annual meeting of The State Bar of California.

PETER J. CROSBY,
President, The State Bar of California

"Secretary-Treasurer J. W. Hawkins of Modesto presented the report of the Board of Governors, outlining the activities of the board during the past year. The disciplinary activities of the Board as set forth in the report show a decided falling off as compared with previous years, due largely to the delay in securing a decision in In re Herron, 81 Cal. Dec. 549. Seventy disciplinary cases were heard, of which 50 were dismissed; seven private and two public reprimands were administered, three disbarments were recommended to the Supreme Court and in eight cases suspensions for periods varying from six months to three years were recommended.

"The report of the canvass of the ballots cast at the recent election for members of the Board of Governors was presented, showing the election of James F. Brennan, San Francisco, and John Perry Wood, Los Angeles, as governors at large, and Jesse W. Carter, Redding; Edward I. Barry, San Francisco; Charles E. Snook, Oakland; Hubert C. Wyckoff, Watsonville, and Henry G. Bodkin, Los Angeles, as district governors. The newly elected members were presented by President Slosson, and the oath of office was administered to them by Mr. Chief Justice William H. Waste of the Supreme Court.

"During the noon recess a most interesting luncheon was given under the auspices of the women lawyers of the State. Miss Esther B. Phillips, Assistant United States Attorney at San Francisco, presided, and interesting addresses were delivered by Mrs. Dorothy Lenroot Bromberg, of Los Angeles, on 'Observations on Expert Medical Testimony in Civil Cases,' and Mrs. Edith C. Wilson, Assistant District Attorney of San Francisco, on 'The Women's Court of San Francisco.'

"A most interesting symposium on the general topic of legal education and admission to the bar occupied the Thursday afternoon session. Vice-President David M. Burnett, of San Jose, presided, and Alfred L. Bartlett, Los Angeles, chairman of the Committee of Bar Examiners, which, he said, antedated The State Bar by several years, presented the report of the committee, which contained some interesting statistics relating to the results of bar examinations. The committee is making a survey of requirements for admission to practice in other States in

order to be better able to meet the problems that are constantly arising and is securing the cooperation of examining committees of other States and of the American Bar Association. The training of repeaters and new students, the preparation of examination questions and the procedure and scope of bar examinations and the problems of admission on motion, which is one of the most serious problems confronting the bar, are treated in the report, which was received and filed.

"James E. Brenner, of the faculty of Stanford University Law School, and research secretary for the Committee of Bar Examiners, delivered an interesting and informative address on 'Standards for Admission to the Bar in Other States of the Union.' Bert W. Levit, of the San Francisco bar discussed 'Overcrowding the Bar'; Leo M. Anderson, of Los Angeles, spoke on 'Problems Arising from the Admission of Attorneys from Foreign Jurisdictions'; and Marvin B. Sherwin, of Oakland, addressed the convention on 'Moral Qualifications for Admission to the Bar.'

"W. H. Anderson, of the Los Angeles bar, led the discussion that followed the delivery of the addresses. Other speakers were Saul S. Klein, Los Angeles; Frank E. Murphy, Stockton; Maurice Saeta, Los Angeles; A. L. Levinsky, Stockton; Robert L. McWilliams, San Francisco, and Kimball Fletcher, Los Angeles.

"The day's proceedings closed with the Morrison Foundation address by Hon. James Grafton Rogers of Washington, D. C., Assistant Secretary of State of the United States, on 'The Lawyer in American Public Life.'

"Vice-President Max C. Sloss, San Francisco, presided at the evening session and outlined the creation and purposes of the Alexander F. Morrison Foundation, which had been established by Mrs. Morrison, widow of the eminent San Francisco lawyer, and the surviving members of the firm of Morrison, Hohfeld, Foerster, Shuman and Clark, for the purpose of financing the delivery annually of an address by some distinguished jurist upon a subject of interest and importance to the bar, and the printing of the lectures following their delivery. This, the speaker said, was the third lecture in the series, the first having been delivered at San Francisco by Sir William Holdsworth, successor to Sir William Blackstone, great commentator on the common law, Vinerian Professor of Law at the University of Oxford; and the second last year at Pasadena by Dr. Roscoe Pound, dean of Harvard University Law School.

"The Friday morning session was devoted to an exposition of the work of the Section Department of The State Bar. President Slosson presided and former President Joseph J. Webb of San Francisco outlined the reasons animating the Section Committee, which is composed of O. K. Cushing, Albert A. Rosenshine and Joseph J. Webb, in providing for the establishment of a Research Department under the direction of Prof. Evan Haynes of the School of Jurisprudence of the University of California, assigned to cooperate with The State Bar by President Robert Gordon Sproul of the University. In this work The State Bar will have the active cooperation of the law schools of Stanford University and of the University of Southern California.

"Declaring that 'law is the pathology of human nature,' Prof. Evan Haynes delivered an address on 'Law Reform and Law Reformers,' in which he outlined the progress of law reform and the efforts of the reformers. The Research Department will, he said, supply the sections with data and information on subjects with which they concern themselves, distribute the conclusions of the sections to each other and arrange to have the results of the section work classified and made available for use.

"Walter H. Stammer, of Fresno, a former member of the Board of Governors, spoke on 'The Lawyer's Contribution to Professional Progress,' dealing with the obligation of the general practitioner to devote some time to the improvement of the administration of justice. 'Co-operation in Legal Research' was the subject covered by Dean Marion R. Kirkwood of Stanford University, in which he commented upon the program of the research department. Dean William Green Hale of the law school of the University of Southern California, spoke on 'Mobilizing the Profession for Constructive Service.'

"With Vice-President Guy R. Crump of Los Angeles presiding, the convention heard an interesting discussion on the improvement of the administration of justice at the afternoon session of Friday. Prof. Samuel C. May of the Department of Political Science of the University of California, in an informative address, compared judicial administration with other types of governmental administration. Hon. Newton W. Thompson spoke on 'Real Property and the Law's Delays,' and Reynold E. Blight of Los Angeles, former tax expert of the State of California, gave a thought-provoking address on 'The Mounting Cost of Litigation.'

"Following the addresses, Judge Victor F. McLucas of Los Angeles, presiding judge of the appellate department of the Superior Court, outlined the expeditious procedure of that tribunal under which 1800 appeals have been disposed of in the past two years with the writing of but thirty-five opinions.

"United States District Judge Harry A. Hollzer of Los Angeles, former research director of the Judicial Council, compared the procedure of the Canadian Province of Ontario, where the judicial business of the province is handled by nineteen judges, with that of California, where 200 judges are necessary to take care of litigation of the people, a situation that, he said, offers food for intensive reflection.

"C. M. Booth of Los Angeles pointed out that the machinery of the courts in the larger centers has broken down because of lack of organization and competent direction, due, chiefly, to the fact that the presiding judge is not clothed with sufficient power to adequately deal with the situation. The people demand and are entitled to a change and it is the duty of The State Bar to aid in bringing that change about, he declared.

"Mr. Chief Justice William H. Waste declared that in the effort of the Judicial Council to improve and expedite court procedure, the chief opposition to reforms came from the bar. To the end that necessary reforms may be instituted, the Chief Justice asked the cooperation of the bar, without which the Council cannot achieve its purpose. . . .

"A resolution introduced by Walter McGovern, of San Francisco, for the amendment of Rule Three of the Rules of Professional Conduct so as to make it applicable to every 'person, firm or corporation' instead of only to claimants in personal injury or death cases, was adopted after considerable argument. The resolution, which was designed to reach all members of the bar accepting professional employment from unlicensed persons who solicited and controlled the employment, was attacked on the ground that it would preclude insurance companies and title companies from employing attorneys for the purpose of defending cases covered by the terms of their policies. This was denied by the proponents of the resolution and by several others who favored the resolution.

"Carried to its logical conclusion Rule 3 as amended would render subject to discipline every member of the bar employed by a bank or a trust company on a salary, through whom such concerns, according to the proponents of the amendment, engage in the unlawful practice of the law. . . .

"At the opening of the evening session, Oscar J. Seiler, of Long Beach, presented the report of the Committee on Suppression of Solicitation of Legal Business. The majority report, which contained the following recommendations, was approved:

"'1. That a committee be created and charged with the duty of arousing the interest of the local bar associations and the members of The State Bar generally in the suppression of the soliciting of legal business, and of informing the bar of the reasons for the rules against soliciting professional employment by lawyers, and of endeavoring to secure the cooperation of local bar associations and lawyers in effectively prohibiting it.

"'2. That the Board of Governors, through the State-wide Committee of Fifteen, carry on a campaign of publicity among the general public for the purpose of demonstrating the reasons for, and the necessity of, the rule against soliciting professional employment by lawyers, and the reasons for prohibiting the solicitation of legal business by laymen or lay organizations, and that this committee endeavor to secure the cooperation of the local bar associations in its work.

"'3. That any member of The State Bar who violates the rules against soliciting professional employment in any manner be appropriately disciplined.

"'4. That the fact-finding committee on unlawful practice of the law be continued as a permanent part of the machinery of The State Bar.

"'5. That whenever the Board of Governors, through such fact-finding committees or otherwise, finds that any person or organization not a member of The State Bar is soliciting legal business that an attempt be made to induce it to discontinue such solicitation, and that if it shall fail to so discontinue it, that appropriate legal proceedings be immediately prosecuted to force it to desist from such practice.

"'6. That no attempt be made to induce the Legislature to define the practice of law.

"'7. That The State Bar attempt to secure the passage by the next Legisla-

ture of a bill worded substantially as follows:

"'An act prohibiting the use of written statements taken from injured persons within thirty days after the injury; also making void certain settlements, compromises, releases and discharges unless approved by the court.

"'(a) Any adverse written statement secured from an injured person by an adjuster, agent or other person in behalf of the person committing the injury, or his insurance carrier, within thirty (30) days after the injury is sustained shall be inadmissible as evidence in any court.

"'(b) Any settlement, compromise, release, discharge or satisfaction of claims procured from any injured person within thirty (30) days after such injuries were sustained, and without an order of court approving the same, shall be voidable at the option of the injured person.'

"A group of resolutions occupied the attention of The State Bar convention at the 'open forum' at the Friday night session of the convention.

"A resolution providing that the Board of Governors proceed forthwith to institute and prosecute necessary legal proceedings against all persons and corporations engaged directly or indirectly in the unlawful practice of the law, introduced by Marion P. Betty of Los Angeles, was adopted. The resolution carried with it an appropriation of $10,000 or such additional sum as may be necessary to carry out its purposes.

"A resolution by Harry A. Goldman of Los Angeles, advocating the enactment of a constitutional amendment providing that all encumbrances on real property, regardless of form, including deeds of trust, shall be deemed mortgages, was referred to the Board of Governors for consideration and report at the 1932 meeting.

"A resolution by Willard W. Shea of Oakland, providing for the appointment of a Committee on Criminal Law and Procedure to prepare and present to the 1932 convention recommendations for such amendments to the Penal Statutes as may, in its judgment, improve the administration of criminal justice, including the disposition of offenders after conviction, was adopted. The resolution provides that the committee shall cooperate with the Research Department of The State Bar, the Bureau of Public Administration of the University of California, the District Attorneys' Association and the public defenders of Alameda, Los Angeles and San Francisco counties.

"The Saturday morning session opened with an address by Governor Roland G. Swaffield of Long Beach, who presided, outlining the purposes of the Committee of Fifteen of Public Relations, preliminary to the presentation of the report of the committee. Fred G. Athearn of San Francisco, chairman of the committee, presented the report and explained in detail the scope of the committee's work.

"Mrs. Annette Abbott Adams of San Francisco and Benjamin Harrison of San Bernardino gave short addresses in which they set forth some of the phases of the committee's work and the possibilities of that work in familiarizing the public with the services and functions of the lawyer.

"The report of the committee was adopted after discussion of the general problem from the floor.

"An unsuccessful attempt was made to secure the endorsement in principle of an attorney's lien upon the papers of his client to secure the payment of his fees failed, when, in the closing hour, The State Bar convention referred to the Board of Governors a resolution by Assemblyman C. W. Dempster of Los Angeles, committing The State Bar to such a measure. The board will study the matter and appoint a committee to draft a bill and report at the 1932 convention.

"President Slosson then introduced the newly-elected members of the Board of Governors and presented the incoming president, Peter J. Crosby of Oakland, who expressed to the convention and to the Board of Governors his thanks for the honor that had been conferred upon him and pledged his best efforts to the betterment of the condition of the profession and the advancement of its influence and prestige, and the convention adjourned sine die.

"The convention closed with the annual banquet at the Hotel Del Monte, at which Hon. William H. Donahue of Oakland presided and addresses were delivered by Leonard B. Slosson of Los Angeles, the retiring president; Mr. Chief Justice William H. Waste of the Supreme Court; Peter J. Crosby of Oakland, the new president, and Dr. Robert Gordon Sproul, president of the University of California."

Colorado

Colorado Bar Association Provides for Endowment Fund for Unfortunate Aged Lawyers

The Thirty-fourth Annual Meeting of the Colorado Bar Association was held, as is its custom, in Colorado Springs, on September 25th and 26th.

The retiring president, Harrie M. Humphreys of Denver, delivered the president's address in the form of a paper dealing with ethics and the practical operation of the committee on grievances of the Colorado Bar Association. This committee is recognized by the Supreme Court as the appropriate body to carry on the very important task of investigating and passing on, if necessary, various complaints against members of the Bar. Mr. Humphreys presented an old subject in a new light and as a model of English and expression it was one of the best papers ever read before the Association.

MORTIMER STONE,
President, Colorado Bar Association

Various committees reported in excellent manner, covering the doings of the Association during the last twelve months.

Unfortunate lawyers in the eventide of life will not be without hope in this State. The Colorado Bar Association has, through the efforts of Edward Ring, caused an endowment fund to be created. The administration of the fund will be carried on by a board of three trustees already appointed for that purpose.

The annual address was made by Hon. James Hamilton Lewis of Chicago, United States Senator from Illinois, author of works both legal and historical, orator and advocate. In him the Colorado Bar Association had as its guest a citizen of no mean ability. The fame of our guest brought out many of the Colorado Springs town people and as large an audience greeted him as ever greeted an annual speaker of the Colorado Bar Association. "Ham Lewis," as he is termed the nation over, is in himself sufficient to warrant a reasonable journey just to meet. Senator Lewis is more than an unusual personality, for only a great mind could hold the American people these many years.

The Senator discussed with infinite clarity and ease America's loans abroad, as touching our international influence. The predominating theme and conclu-

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sion of this discussion was that he believed this Republic should make no more loans to Europe.

The fact that the general convention of the Protestant Episcopal Church in America was in session in Denver at the same time enabled the Association to entertain noted lawyers and divines. On Saturday afternoon Professor Beale of Harvard Law School came to Colorado Springs and supplemented his address of 1916 on the subject of "The Expanding Law," at which time he was the annual speaker at the Colorado Bar Association meeting.

Mr. A. B. Andrews of Raleigh, North Carolina, covered the matter of Judicial Salaries. He is chairman of the American Bar Association committee on that subject.

Miss Mary F. Lathrop, well known to members of the American Bar Association, does, at her own expense, a generous thing for the Bar of this State. At the American Bar meeting she gives a dinner each year to many of the "men of parts" in that body, and at those dinners she always invites Colorado people sufficient to give the whole affair a Rocky Mountain atmosphere. It does much to keep our State in the minds of the foremost men of America. For the past two years she has given a dinner to the wives of the past presidents and certain other ladies.

An unexpected surprise was enjoyed by the Association when Fred W. Dallinger, member of Congress from Massachusetts, spoke to the Association on the conditions of the day. He was at Colorado Springs as guest of William R. Eaton of the First Colorado District. We Westerners were delighted to have so conservative an Easterner as Congressman Dallinger for a speaker.

To the success of the annual banquet the Episcopal people contributed much in the personage of Dr. Percy Silver and Dr. Z. B. T. Phillips, Chaplain of the United States Senate and boyhood friend of Harrie Humphreys. Dr. Phillips addressed the annual dinner in a most interesting manner.

The annual dinner was also addressed by Hon. H. P. Burke, Justice of the Supreme Court of Colorado, an orator of ability.

Bishop Irving P. Johnson presented as his guest Mr. Page of Virginia, who exhibited all the culture and eloquence of the old South in his short address. Bishop Johnson also made a brief talk at the banquet which delighted the entire audience. There is no more delightful speaker in the whole country than Bishop Johnson, whose eloquence is known in many states.

O. S. Seymour of the New York Bar, Chairman of the Committee on Professional Ethics of the Bar Association of the City of New York, forwarded a paper to be read, entitled "The Unlawful Practice of Law by Corporate Fiduciaries." Mr. Seymour later complimented the meeting by his attendance at the banquet and spoke in a most delightful vein.

The business concluded with the election of Mortimer Stone of Fort Collins, Colorado, as president and our retiring president, Harrie M. Humphreys, was again made secretary and treasurer. His contribution to the Bar Association of Colorado and his activities as a lawyer in general of this State have amounted to a statewide contribution. The writer is retiring as secretary and treasurer in order that Mr. Humphreys may again take up the important work which over many years he has handled with competency and dispatch.

ALBERT G. CRAIG, Retiring Secretary.

Vermont

Vermont Bar Association Declares for Adherence to World Court

The fifty-fourth annual meeting of the Vermont Bar Association was held in the Assembly Hall of the National Life Insurance Company in Montpelier, October 6 and 7, 1931. The attendance was the largest for many years. President George L. Hunt of Montpelier delivered an address on "The Lawyer at the Bar of Public Opinion." At his suggestion a committee was appointed to cooperate with the press in bringing to the attention of the public correct information about the courts and their business.

Mr. Justice Thompson of the Supreme Court gave a very instructive and entertaining address about his tour through France, England and Scotland during the past summer.

Tuesday evening was given over to the consideration of the question of adherence by the United States to the World Court. After listening to a fine address by Dr. Manley O. Hudson the Association unanimously adopted resolutions in favor of the United States signing the protocol.

Wednesday forenoon was taken up by committee reports among others the Committee on Vermont Annotations to the Restatements of the Law by the American Law Institute, the work of which is making good progress.

On Wednesday afternoon, Judge Edgar A. McCulloch of the Federal Trade Commission gave a scholarly address on "Some of New England's Contributions to the Development and Culture of the Southwest" in which he spoke of the services of the Poland Commission headed by Luke P. Poland of Vermont during the reconstruction period in Arkansas.

Memorial sketches of Judge Harry Blodgett and Mr. Thomas H. Browne were read.

The annual dinner was held Wednesday evening and attended by 130 members and guests. After dinner speakers were Governor Wilson, Mr. Justice Moulton and Judge Graham. The principal speaker was Hon. William R. Pattangall, Chief Justice of Maine, who gave an inspiring address in his inimitable manner on "The Bench, the Bar and the Public." He urged the Bench and the Bar to see that the fundamental purpose of the courts to establish justice was carried out. An unusual event occurred during the meeting when Chief Justice Powers administered the oath of office to Judge Warner A. Graham, recently appointed Associate Justice of the Supreme Court to fill the vacancy caused by the resignation of Mr. Justice Willcox.

The following officers were elected: President, Guy M. Page, Burlington; Vice-Presidents, Cebra Q. Graves, Bennington; Hubert S. Pierce, Newport; William H. Adams, Chelsea. Member of Board of Managers, Leonard F. Wing, Rutland; Secretary, Harrison J. Conant, Montpelier; Treasurer, Webster E. Miller, Montpelier.

The next annual meeting will be October 4, 1932.

H. J. CONANT, Secretary.

Miscellaneous

The Young Lawyers Club, of Montgomery County (Pa.) was recently organized and the following chosen as officers: President, David E. Groshens; Secretary and Treasurer, Desmond McTighe; Directors, Edward Duffy, Harry Houser and Arthur W. Bean.

New officers of the Junior Bar Association of Dallas (Tex.) are as follows: Marion B. Solomon, President; James F. Gray and Harry Page, Vice-Presidents; Jack Lewis, Secretary-Treasurer.

N.S.R.A.

One shorthand reporter out of three in the United States is a member of the National Shorthand Reporters' Association, incorporated at Washington, D. C., in 1904. The Secretary is A. C. Gaw, P. O. Box 334, Elkhart, Indiana, who maintains a Service Bureau for reporters, lawyers, judges and others, and from whom a Directory of shorthand reporters in the United States may be obtained without charge. Or ask your local reporter for a copy, and ascertain from him how he may serve you.

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